# THE CASE FOR AN AFFIRMATIVE CONSENT PROVISION IN RAPE LAW

ERIC SANDOVAL*

## ABSTRACT

Rape and sexual assault are serious problems in the United States. This Article will discuss the historical and current legal status regarding rape laws. It will also argue that states should adopt an affirmative consent provision in rape statutes. The Article will be broken up into three parts. The first part of this Article chronicles the history of rape laws in the United States. It will discuss how rape laws were originally written and how we have made progress in our current rape statutes. Second, this Article will discuss the current state of rape laws in the United States. It will discuss how the laws have been improved upon but how they still present challenges for victims, law enforcement, and prosecutors.

Finally, this Article will discuss the direction rape law should move towards in the American legal system. This Article will argue that some statutory requirements should be removed from the current legal definition of rape and that other elements should be added. Specifically, it will argue that an affirmative consent provision should be added into state rape statutes. This Article will also discuss, and ultimately reject, common arguments against creating an affirmative consent provision in rape law. This Article will show why states should adopt the affirmative consent standard over the current force standard.

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*† Eric Sandoval obtained his law degree from the University of North Dakota School of Law in 2016 and his B.A. in History from Colorado Mesa University in 2013. He is licensed to practice law in Colorado. He became an attorney with Alpine Legal Services in January 2019, where he primarily focuses on family law. He speaks both Spanish and English and was born in Aspen, Colorado, where he continues to reside. Eric loves the outdoors and in his free time enjoys skiing, hiking, and photography.

## I. INTRODUCTION

On average, there are 293,000 instances of sexual assault a year in the United States.[1] Furthermore, this figure only includes instances of sexual assault in which the victim is age twelve or older.[2] Every ninety-eight seconds

1. *Your Role in Preventing Sexual Assault*, RAINN, https://www rainn.org/articles/your-role-preventing-sexual assault (last visited Mar. 24, 2019).
2. *Id.*

that passes another sexual assault occurs.[3] Forty-four percent of the victims will be under eighteen years of age and eighty percent will be under the age of thirty.[4] Figures like these demonstrate the problem and prevalence of sexual assault in our society. This problem becomes more complicated when you consider that many sexual assault crimes are not fully reported, investigated, or prosecuted because the crime is not considered a rape if force was not used in most states.[5] There are currently many sites on the Internet, such as us.reachout.com, that showcase personal accounts of rape victims. Personal accounts like these help show the devastation caused by sexual assault, especially when other people will not believe a victim because it was not a traditional rape. This Article will attempt to offer a solution that would help alleviate this problem. The proposed solution is for universities and state jurisdictions to adopt an affirmative consent provision in their rape statutes.

The first part of this Article chronicles the history of rape laws in the United States. After establishing a historical background, it will discuss the procedural rules that made it harder for victims to make a claim against their attackers. The substantive elements of rape law will be discussed, showing how narrowly construed the offense once was in the criminal code. This Article will also describe the resistance requirement, which was one of the biggest obstacles for victims trying to prove a rape charge against their attacker in the past.

Second, this Article will discuss the current state of rape laws in the United States. This will illustrate how the rape laws have changed and progressed, and how hopefully that will give state legislatures the motivation needed to work towards better laws and a fairer society. To do so, this Article will discuss how some states are pushing away from the resistance requirement. This has also caused states to look at the force element in rape through different methods of measuring evidence. While this is a step on the way to progress, courts should instead analyze consent rather than force in sexual assault crimes.

Third, this Article will discuss the direction rape law should move towards in the American legal system. It will argue that the American legal system should abandon the extrinsic and intrinsic force standards and look at consent in sexual assault crimes. Specifically, state legislatures should adopt

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3. *Scope of the Problem: Statistics*, RAINN, https://rainn.org/statistics/scope-problem (last visited Mar. 24, 2019).

4. *Victims of Sexual Violence: Statistics*, RAINN, https://www rainn.org/statistics/victims-sexual-violence (last visited Mar. 24, 2019).

5. *See 1 in 5 Women Is Sexually Assaulted in College. Just 1 Percent of Attackers Are Punished.*, MOTHER JONES (Dec. 3, 2014, 11:00 AM), http://www motherjones.com/politics/2014/12/campus-sexual assault-rape-stats-charts [hereinafter *1 in 5 Women Is Sexually Assaulted in College*].

an affirmative consent provision in their rape statutes. This Article will also discuss the growing number of jurisdictions that have adopted sexual assault laws based on affirmative consent standards, such as California and New York.

Finally, this Article will argue against common positions that opponents of the affirmative consent provision present. These arguments include that the affirmative consent standard is too strict and does not protect defendants who are mistakenly charged in court. This Article will demonstrate why these positions are not as imposing as opponents make them out to be. From these arguments, a case will be made as to why the affirmative consent standard should be adopted by university and state jurisdictions. The affirmative consent standard should be adopted in order to better protect victims and effectuate justice for them.

## II. WHERE WE HAVE BEEN

In the not so distant past, rape was not taken seriously in American law. The laws were heavily favored towards men. The laws were created and interpreted in a way that made it difficult for women to seek a rape charge against their attacker. This is because rape law has traditionally been male-oriented since biblical times. This is illustrated in the Book of Deuteronomy, in which a man who raped a woman had to make amends to the woman's father instead of to the woman.[6] Rape law originated in a time when misogyny was more prevalent and women did not have a say in legal affairs, even when those affairs specifically involved them. Women were seen as objects and were a man's property, and any harm that came to them was actually against the man who "owned" them. Due to a legal past like this, it is easy to see why it took so long for our society to progress to the point we are at now.

### A. PROCEDURAL ISSUES IN THE HISTORY OF RAPE LAW

Until very recently in the United States, state laws—both statutes and judicial interpretation of those statutes—often made it very hard for women to successfully vindicate a rape charge. For example, on the procedural side of the law, various rules such as the Model Penal Code barred rape prosecutions when the female did not notify authorities within a brief period of time after her assault.[7] This made things more stressful for the victims because it forced them to build up the courage to face this traumatic event under a time limit or else the doors of the law would not even open for them. Furthermore, this time-limited system failed to take into account the many victims for

6. *Deuteronomy* 22:28–29.
7. MODEL PENAL CODE § 213.6(4) (AM. LAW INST., Proposed Official Draft 1985).

which a time limit was even harder to contend with. For victims of crimes such as spousal rape, it likely takes the victim longer to find the strength to bring charges against the attacker.[8] Procedural rules like this made it harder for women to feel like they had an equal voice in the criminal justice system.

Another problem in rape prosecution was that judges tended to believe that rape cases were not serious matters for victims. In one case from Oregon, for example, an appellate court affirmed a trial judge's rejection of a formerly accepted and common jury instruction that stated a rape charge "is easily made and once made, difficult to defend against even if the person accused is innocent."[9] This previous judicial attitude shows how judges did not understand the serious matter that rape was to victims. Courts believed that a rape charge was a graver matter for defendants, instead of the victims who had to live with the trauma of the attack for years to come. This trauma was not helped at all by the incredulity that victims were forcefully greeted with by the justice system.

Some states even required victims to obtain witnesses that would corroborate their rape charge before the charge could proceed.[10] Judicial attitudes and evidentiary rules like these made it harder for rape victims to have their crimes prosecuted. This is because rape crimes rarely have witnesses and when they do, it is highly doubtful that the witness would be a friend of the victim. This was just another method that the justice system used to make women feel like such a heinous crime committed against them did not matter in the eyes of society, and that they did not have a voice.

The final procedural problem with rape law was that defense attorneys were allowed to cross-examine the witness and introduce evidence of their prior sexual history in order to make them seem promiscuous and not worthy of the law's protection.[11] It was this fact that weighed most in a victim's mind when deciding to bring forth charges against her attacker. It was easier to let your attacker go free of punishment than to go to court and receive criticisms and insults in front of a jury and to feel like less of a person. It would also make victims feel like they were not fully represented in the legislative or justice system. It is because of a prior history filled with misogynistic

8. *See* Michèle Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent & Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim is Non-traditional*, 17 AM. U. J. GENDER SOC. POL'Y & L. 41, 43–78 (2009).

9. State v. Bashaw, 672 P.2d 48, 49 (Or. 1983).

10. MODEL PENAL CODE § 213.6(5).

11. Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 416 (1998).

problems like these that make women feel, even now, that their concerns are not truly heard by the legislative or judicial systems.

### B. SUBSTANTIVE ISSUES IN THE HISTORY OF RAPE LAW

However, not only were there problems with criminal procedure in rape law, but the substance of rape law also posed problems for women. When rape was first defined in American law, it was described as unlawful sexual contact with a woman that was forcible and against her will.[12] In the beginnings of American rape law, an idea formed that force was a requirement. The problem with this was that it refused to acknowledge rape victims who were not forcibly raped but still did not give consent. For example, women who were unconscious at the time of the rape were not protected, even though they were unquestionably victims of rape.[13] This resulted in countless rapists avoiding punishment altogether. Additionally, because their criminal behavior was not punished, there was no deterrence effect for the rest of society.

Furthermore, a problem much more significant than the force requirement was the resistance requirement. Women were required to defend themselves and resist the attacker often "to the utmost."[14] This meant that women who did not resist their attacker sufficiently were not entitled to legal recourse. This made it so that many real victims who could not resist because of other circumstances, such as intoxication, could not successfully seek a rape charge against their attacker. The resistance requirement was a way for the courts to determine if the victim merited the defense of the law.[15] Using this legal requirement, society was able to enforce stereotypes of what the "good" woman was supposed to do and ferret out claims by women who did not deserve society's protection. The intoxicated victim who could not resist was seen as less deserving and therefore was not protected. This made many victims who could not obtain the law's protection feel worse than they already did by telling them the law judged them as being inferior. Furthermore, the resistance requirement caused rapes to become more physically aggressive. This is due to the fact that when a victim fights back, there is an increased chance that the attacker will become more aggressive and the victim will sustain increased physical injuries.[16]

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12. *Id*.
13. Alexandre, *supra* note 8, at 62.
14. Starr v. State, 237 N.W. 96, 97 (Wis. 1931).
15. State v. Rusk, 424 A.2d 720, 733 (Md. 1981).
16. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ-126826, FEMALE VICTIMS OF VIOLENT CRIME 11 (1991).

A good indicator of the injustice of the resistance requirement can be seen in *Moss v. State*.[17] The Mississippi Supreme Court in that case ruled that "a mere tactical surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost."[18] This viewpoint failed to take into account each victim's respective circumstance and judged every victim's resistance as compared to how the justice system felt the "good" female victim would react. The court cared more about the rights of the defendant than about the crime done to the victim. While caring about the rights of defendants is a noble thing that helps ensure justice is carried out effectively, it should not come at the price of ostracizing the victim from the legal system and making them feel like they are not deserving of the law's protection.

Under these viewpoints, nonconsensual sex, absent a forceful attack and full resistance by the victim, was not enough to make a rape charge stand. Both the procedural rules and the substantive law made it so that victims were reluctant to come forward because they did not feel protected by the legal system. The previous form of rape law was extremely narrow, making it difficult to prosecute and prove the crime. The resistance requirement made it even harder for prosecutors and enhanced the risk of serious injury to the victim.

## III. WHERE WE ARE

Fortunately, things have gotten better since the times of the intentionally onerous procedural and substantive hurdles previously elucidated. The biggest change has occurred to the concept of force in rape law. Many force provisions that were part of prior rape laws have either been removed or greatly lessened.[19] This can demonstrate to activists the importance of persevering toward a goal because progress can be made, albeit often rather slowly. However, while we have made great strides toward making rape law fairer for victims, there are still ways in which the law can progress further.

17. 45 So. 2d 125 (Miss. 1950).

18. *Moss*, 45 So. 2d at 126.

19. *See, e.g.*, MINN. STAT. § 609.347(2) (2019); Beth Squires, *Why Do We Still Have Laws that Say It's Not Rape Unless the Victim Fights Back?*, VICE (July 27, 2017, 12:29 PM), https://broadly.vice.com/en_us/article/evdedn/earnest-resistence-laws-that-say-its-not-rape-unless-the-victim-fights-back ("Very few states have in their codes that resistance is required . . . .").

### A. CHANGES TO THE RESISTANCE REQUIREMENT

Most states today have removed the previously mentioned resistance requirement.[20] For example, the Minnesota statute that governs the evidence needed in criminal sexual conduct cases states that "in a prosecution . . . there is no need to show that the victim resisted the accused."[21] Some states lessened the resistance requirement and only required that the resistance be reasonable for a time.[22] This occurred in the 1970s when the courts decided that the victim had to offer only that the resistance that would be reasonable under the circumstances.[23] In addition, the concept of "reasonable" resistance was less formidable than it used to be as a change in the courts' attitudes made it easier to claim that a victim's resistance was reasonable. This helped victims feel like they were more fairly represented in the legal system. Particularly in states that have eliminated the resistance requirement, many victims who previously would not have been able to go to court could approach the court without fear of what they did or did not do during the attack coming under scrutiny. The victims also had a better chance of getting justice for the crime committed against them. Furthermore, the gender stereotype of the "good" woman who merits our protection has become less prevalent, at least in the legal system, even if it has not yet disappeared completely from society.

However, the reasonable resistance requirement still had significant faults, leading to today's majority approach of removing the resistance requirement altogether. For example, the reasonable resistance standard removed the introduction of evidence that a victim felt fear and might have wanted to introduce to the court to substantiate a claim.[24] The reasonableness standard took away the ability of victims to present their account of the rape.[25] This was because women would no longer take the stand to substantiate their claim, and instead the courts would analyze and determine if the victim's resistance was reasonable based on the facts the prosecution presented. This ability was helpful to victims because it allowed them to present their case to a jury. And a jury is likely more sympathetic after hearing the victim's personal account. By replacing this personal account with the reasonableness standard, it lessened the earlier "utmost" resistance requirement,

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20. *Id.*

21. MINN. STAT. § 609.347(2).

22. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 957 (1998).

23. *See* People v. Dozier, 447 N.Y.S.2d 35, 36–37 (N.Y. App. Div. 1981) (Main, J., dissenting).

24. People v. Dorsey, 429 N.Y.S.2d 828, 832 (N.Y. Sup. Ct. 1980).

25. *Id.*

but removed subjective personal accounts that could help a victim's case. However, the reasonableness standard is still superior to the earlier resistance requirement and therefore represented a step towards progress.

Even in states that eliminated the formal resistance requirement, it still did not completely disappear from the justice system. Some courts remained unwilling to completely remove traces of the resistance requirement. For example, in *State v. Lovato*,[26] the court upheld a jury instruction that lack of resistance could be used as a factor in determining the appropriate charge.[27] This was problematic because courts clung to the vestiges of prior rape laws, often showing an unwillingness to move on from a one-sided legal regime. By allowing lack of resistance to be used as a factor in sentencing, the justice system continued to penalize the victim for failing to fight back against her attacker.

Furthermore, since resistance has only been recently removed in some states, its widespread effects are still felt in many opinions, especially when it comes to the force element of rape. This can be seen in the legal concept of "passive resistance."[28] Passive resistance refers to the victim's verbal and nonphysical responses to a rape[29] – for example, if a victim screams or attempts to block themselves off from the attacker. Courts have had a hard time trying to separate the differences between traditional active resistance and passive resistance. For example, in *People v. Salazar*,[30] the court admitted that the legislature had intended to remove resistance as an element needed to prove rape.[31] The court then reasoned that this removal placed a higher emphasis on the force element, and the court was unwilling to disregard the acts of passive resistance that were expected of the victim under the old statute.[32] This demonstrates how courts still require some form of passive resistance in order to demonstrate rape.[33] As an illustration, saying the word "no" is a common form of passive resistance that can be used to prove the crime of rape. The element of passive resistance is protected because courts argue that some form of rejection needs to occur that can demonstrate the intercourse was nonconsensual and to help prove the crime beyond a reasonable doubt.

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26. 702 P.2d 101 (Utah 1985).
27. *Lovato*, 702 P.2d at 109–10.
28. SUSAN ESTRICH, REAL RAPE 31–41 (1987).
29. *Id.* at 40–41.
30. 144 Cal. App. 3d 799 (Cal. Ct. App. 1983).
31. *Salazar*, 144 Cal. App. 3d at 808.
32. *Id*. at 807.
33. *Id.*

While, again, this change is preferable to the earlier traditional active resistance requirement, it still had issues associated with it. The problem with this standard is that it failed to recognize victims who could not resist because they were intoxicated or because they were too afraid of their attacker.[34] For example, women who were drugged would have been unable to prove a rape charge once the drugs had passed from their body, since force would not have been used to commit the rape. In addition, women who did not resist because they were too afraid of their attacker to mount any resistance—a frequent victim response that courts have acknowledged[35]—would not have had any evidence to prove the resistance element of the crime. Unfortunately, these victims often have a harder time proving that a crime was perpetrated against them. Due to these reasons, it is clear that the passive resistance idea was not sufficient to protect victims and hold perpetrators accountable.

### B. THE MENS REA ELEMENT IN RAPE LAW

Another change that has been made to American rape law is the general disinclination among the courts to analyze the mens rea element of rape law. Mens rea generally refers to the defendant's mental intent to commit the crime he or she is charged with committing. For most crimes, the jury spends a large percentage of the trial determining if the defendant possessed the required mens rea to commit the crime. This does not occur in American rape law because courts tend to focus on the victim's consent and actions rather than on the mental state of the defendant. This is due to the problem of trying to define what the required specific mens rea for rape would be.[36] This has led to courts ignoring the defendant's specific intent to engage in unlawful intercourse and instead to focus on a sufficient general intent to commit the crime. This is seen in one recent case in which the Alaska Court of Appeals ruled that rape was a general intent crime, and so specific intent was not needed to find a defendant guilty.[37] In one sense, this standard is favorable to victims and for the prosecution because less evidence is necessary to pass the burden of beyond a reasonable doubt to convict the defendant of a crime. However, there are some problems with this approach as well.

Due to the lack of parameters in a general-intent analysis, courts have varied in determining what constitutes a general intent to commit rape. Some have argued that the court system's refusal to take a closer look at the

34. Alexandre, *supra* note 8, at 50.

35. *See* State v. Wright, 598 So. 2d 561, 565 (La. Ct. App. 1992).

36. ESTRICH, *supra* note 28, at 37.

37. Steve v. State, 875 P.2d 110, 116 (Alaska Ct. App. 1994), *abrogated by* Jeter v. State, 393 P.3d 438 (Alaska Ct. App. 2017).

defendant's mens rea is a disadvantage to the victim.[38] It is incorrect to place the emphasis on the victim and their actions while simultaneously refusing to analyze the defendant with a heightened level of scrutiny. The "inquiry into the victim's nonconsent puts the woman, not the man, on trial. Her intent, not his, is disputed; and because her state of mind is key, her sexual history may be considered relevant."[39] This is one of the most significant reasons that victims will not report their rapes – they are afraid of having their life analyzed and belittled by the justice system. This factor can be seen in statistics which show that more than three out of four sexual assaults go unreported.[40] This low reporting rate problem is further elucidated by the infographic in Appendix A.

It is apparent that there is a problem with American rape law. So few of the crimes get reported, and the ones that do get reported infrequently result in justice for the victim. This is illustrated in an article by Melanie Newman in which she states that "[o]nly around 15% of rapes recorded by police as crimes in 2012/13 resulted in rape charges being brought against a suspect."[41] Additionally, she states that "despite soaring reports of rape for the past decade, detections, prosecutions and convictions in rape cases have not kept pace – and attrition, the rate at which cases drop out of the system, has gone from bad to worse."[42] Furthermore:

> In 2012/13 there were 4,294 allegations of rape.
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> - 29% of cases dropped out because they were not recorded as crimes
> - 17% of cases stalled because a suspect was not identified
> - 18% of cases ended because the suspect had been identified but not arrested, mainly due to insufficient evidence (6% of all allegations) and the victim being unwilling (10% of all allegations)
> - 19% of cases were dropped after arrest, mainly due to insufficient evidence (11% of all allegations) and the victim being unwilling (4% of all allegations)[43]

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38. ESTRICH, *supra* note 28, at 39.

39. *Id*. at 83.

40. *The Criminal Justice System: Statistics*, RAINN, https://rainn.org/get-information/statistics/reporting-rates (last visited Mar. 24, 2019).

41. Melanie Newman, *Revealed: Why The Police Are Failing Most Rape Victims*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 28, 2014), https://www.thebureauinvestigates.com/2014/02/28/revealed-why-the-police-are-failing-most-rape-victims/.

42. *Id.*

43. *Id.*

This is not just a problem in the United States. As the graph in Appendix C shows, the rape conviction rate in Europe is also substantially lower than the reporting rate.[44] This demonstrates that this problem is not just prevalent in the United States but in many similar countries as well. Even more distressing is the fact that these figures do not take into account the number of victims who do not report a rape. There are many reasons that rapes don't get reported, but one of the reasons is the fear that victims have that they are not equally protected by the court system and that they will be put on trial rather than their attacker.[45] This fear is further strengthened by the fact that courts do not take a closer look at the defendant's mens rea and instead choose to emphasize what the victim did or did not do. Public advocacy groups such as the Rape Abuse & Incest National Network ("RAINN") and the Community Violence Intervention Center ("CVIC") have attempted to alleviate this problem by trying to assist victims through the legal process as well as trying to advocate for change in the legal system. This effort has had some success as courts and legislatures have tried to find better ways to prosecute rape without looking at force, resistance, or the actions of the victim.

### C. THE FORCE ELEMENT OF RAPE

As the law has evolved, courts have begun paying more attention to the force element. Courts initially did this by measuring the amount of physical force that was exerted by the defendant in the commission of the crime.[46] This led to women feeling like they had to either sustain serious physical injury or risk the court ruling that they were not a victim of rape. In these instances, the prosecution would be unable to present any tangible evidence of the rape besides the victim's testimony, which likely would not be enough proof to pass the beyond-a-reasonable-doubt burden. This interpretation of the law was categorically not good for women because it often forced them to pick between the nauseating choices of sustaining serious physical injury or letting their perpetrator go free without punishment. This type of choice placed victims "between a rock and a hard place." However, many victims understandably did not know the law beforehand and would also be unlikely to think of it during the attack. So if the victim did not know or think about the force requirement, the crime would have taken place in the same way regardless of the legal standard used. It is apparent that the removal of the traditional resistance requirement was a step towards progress in American

44. *Id.*
45. *See supra* notes 38–39 and accompanying text.
46. Dressler, *supra* note 11, at 416.

rape law, but with ideas like passive resistance still in effect in some states, it is clear that more progress can and should be made.

One way that courts have tried to analyze the defendant instead of the victim is through the before-mentioned force element analysis. The analysis of the force element has been one of the biggest changes to American rape law besides the shift away from active resistance. Currently, the majority of state laws require the victim to show that the defendant used some form of force to overcome the victim in a rape.[47] An example can be seen in the North Dakota sexual assault statute, which states that rape occurs if the accused "knows or has reasonable cause to believe that the contact is offensive to the" victim.[48] The South Dakota rape statute is more explicit about requiring force, which states that rape occurs if the accused person "through the use of force, coercion, or threats of immediate and great bodily harm against the victim" sexually penetrates the victim.[49] These statutes demonstrate how, for many jurisdictions, the concept of force and rape remain deeply intertwined.

This entwinement is further seen in a North Dakota Supreme Court case, *State v. Vantreece*.[50] In this case, the court found that the defendant was not guilty of sexual assault because the prosecution could not prove that he compelled the victim to engage in sexual intercourse with him through force.[51] The court found that even though the defendant's conduct was "reprehensible" and he engaged in nonconsensual intercourse with a victim who was vulnerable, because there was not enough evidence of force, the rape conviction could not stand.[52] This case is problematic and demonstrates how American rape laws are still lacking in their protection of victims. In this case, there was clearly a case of nonconsensual intercourse, and the court even admitted that the defendant's conduct was reprehensible, but because the prosecution could not show enough evidence of force used in the act, the defendant could not be charged. This case is a clear indicator of why many female victims feel like they are not equally protected by the law. Cases like these also explain why many victims don't report their crimes because they feel like justice will not be served even if they report the crime.

In an effort to assuage the worries victims have about the legal system, some courts and legislatures have recently attempted to ease the burden for proving force. This has been done using intrinsic force standards. Intrinsic

47. *Id.*
48. N.D. CENT. CODE § 12.1-20-07(a) (2017).
49. S.D. CODIFIED LAWS § 22-22-1(2) (2019).
50. 2007 ND 126, 736 N.W.2d 428.
51. *Vantreece*, 2007 ND 126, ¶¶ 21–22, 736 N.W.2d 428.
52. *Id.* at ¶ 27.

force refers to the idea that rape is in essence a forceful crime, so force is assumed to take place during the sexual penetration.[53] The rationale behind this is that "the intrinsic force standard removes rape from the special category of violent crimes, where most courts have pigeonholed it, and places it in the group of assaultive crimes where contact is measured by its unlawfulness, and not by its degree of forcefulness."[54] This is a better way of measuring the force standard. It classifies rape as what it is – an inherently violent crime. This is a better result for victims, as they would only have to show that sexual penetration occurred without their consent to demonstrate force. This has and will continue to help victims obtain justice in courts and feel more comfortable in reporting rape. This more modern intrinsic force standard is consistent with society's progressive view of forced sexual intercourse as reprehensible. By adopting this idea of force, courts can avoid the muddled analysis of whether the force used by the defendant is sufficient to meet the difficult-to-define force element. This is because the act itself becomes enough to prove the requisite force element. This allows courts to avoid the discussion of whether threats and other nonphysical circumstances of the crime demonstrate a requisite degree of force.

However, not all courts have been willing to adopt intrinsic force standards. In fact, in the majority of jurisdictions, extrinsic force must still be used to prove that a rape occurred.[55] Under an extrinsic force standard, the mere presence of nonconsensual intercourse does not amount to force like it would in an intrinsic force jurisdiction.[56] An example of this would be the earlier mentioned case of *State v. Vantreece* in North Dakota. The North Dakota Supreme Court clearly used an extrinsic force standard because the defendant was found not to meet the force element, even though the court acknowledged that the sexual intercourse was nonconsensual. In extrinsic force jurisdictions, victims are still forced into feeling like the crime committed against them was not serious enough if a significant amount of force was not used by the perpetrator, and this standard perpetuates the troubling trend of low sexual assault reporting rates. This is especially concerning because current statistics show that sexual assault crime rates are not decreasing, especially on college campuses. The extrinsic force standard does not move us toward better rape laws and instead keeps us entrenched and clinging to the ineffective rape laws of the past.

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53. Joshua Mark Fried, *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 PEPP. L. REV. 1277 (1996).

54. *Id.* at 1298–99.

55. *Id.*

56. *Id.*

It is apparent that progress has been made in remaking rape laws to be more equitable to victims in the United States. This can be seen in the lessening, and in some states the outright removal, of the resistance requirement. However, the force element has grown in importance out of the decay of the resistance requirement, which has been a step in the wrong direction. The majority of states still analyze sexual assault crimes using the extrinsic force standard, with the minority of states pushing towards an intrinsic force standard.[57] While this is an improved analysis for sexual assault crimes, the courts and legislatures should now turn their attention to consent as the pertinent standard for sexual assault crimes rather than the use of force.

## IV. WHERE WE SHOULD BE GOING

The progress that has recently been made in sexual assault crimes has been a definite improvement from prior rape laws. However, the courts should abandon the force element analysis in sexual assault crimes and instead look more closely at the element of consent. This can be done by performing an affirmative consent analysis. An affirmative consent provision should be adopted by state legislatures and higher education institutions across the country.

### A. THE AFFIRMATIVE CONSENT ANALYSIS

Affirmative consent is known colloquially as the "yes means yes rule."[58] It refers to the idea that before sexual intercourse, both partners should display an affirmative desire to continue their sexual activity. Sexual partners should do this by explicitly asking the other party if they want to continue towards sexual congress. For sexual intercourse to ensue, both parties must express consent through "clear and unambiguous words or actions."[59] If the other party declines, then the sexual activity must cease. If the other party continues without this clear consent, then that party is guilty of rape, regardless of whether there was force or resistance. The affirmative consent doctrine also dictates that consent cannot be given if one party is impaired by drugs or alcohol, or if one of the parties is incapacitated due to sleep or unconsciousness. It also asserts that consent to one form of sexual intercourse does not mean automatic consent to all forms of sexual intercourse. If one of

57. *Id.*

58. Maura Lerner, *University of Minnesota to Adopt 'Affirmative Consent' Rule for Sex Partners*, STAR TRIB. (July 7, 2015, 2:53 PM), http://www.startribune.com/university-of-minnesota-to-adopt-affirmative-consent-rule/311650821/.

59. *Id.*

the parties withdraws consent, then the sexual activity must stop or else it is considered sexual assault. Similarly, if there is confusion about the state of consent, then the sexual activity must stop until both parties are clear on what has been consented to and what has not.

This doctrine of affirmative consent has mostly been adopted by universities instead of states thus far.[60] For example, the University of Minnesota has an affirmative consent policy.[61] In this policy, the University of Minnesota defines affirmative consent as "freely and affirmatively communicated words or actions given by an informed individual that a sober reasonable person under the circumstances would believe communicate a willingness to participate in the sexual contact."[62] This policy also enumerates several factors for analyzing whether the parties provided valid consent. However, a university policy is not a criminal standard, and it cannot be used in the legal system to obtain a criminal conviction for the defendant. It can be used to punish guilty parties with internal university punishments, such as expulsion, suspension, or loss of financial aid awards. Furthermore, a university policy could also help instruct students on how to properly obtain consent when engaging in sexual intercourse. For example, the policy explains that consent does not exist if the individual is impaired or incapacitated. It also states that consent does not exist if one of the parties is not able to understand the nature of their actions and behavior.

Policies such as those instituted at the University of Minnesota are beneficial because sexual assault is an existential problem on university campuses.[63] It is one of the places in which sexual assault occurs most frequently.[64] Young adult women, of course, are concentrated on college campuses, and they are the group that is most often the victim of rape.[65] An affirmative consent provision could help lower the number of sexual assaults. This is because affirmative consent policies provide clear rules for what is and is not sexual assault, allowing students to conform their conduct accordingly or face the consequences. Furthermore, justice is also served by affirmative consent policies because victims are able to obtain justice under a standard that puts the offender and the victim on more equal footing. For now,

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60. *Affirmative Consent Campus Policy Report*, AFFIRMATIVE CONSENT PROJECT, http://affirmativeconsent.com/consentpolicy/ (last visited Apr. 2, 2019) (stating that forty higher education institutions in the United States have adopted affirmative consent policies).

61. *Administrative Policy: Sexual Harassment, Sexual Assault, Stalking and Relationship Violence*, UNIV. OF MINN. (Jan. 1, 2018), https://policy.umn.edu/hr/sexharassassault.

62. *Id.*

63. *1 in 5 Women Is Sexually Assaulted in College*, *supra* note 5.

64. *Id.*

65. *Campus Sexual Violence: Statistics*, RAINN, https://rainn.org/statistics/campus-sexual-violence (last visited Mar. 26, 2019).

university policies and punishment provide at least a limited avenue to vindicate sexual assault victims, even if they remain unable to successfully convict the defendant in criminal court. In this context, victims feel more secure, and this makes the university experience a safer, fairer, and more fulfilling experience for both men and women.

### B. THE NEED FOR AN AFFIRMATIVE CONSENT STANDARD

The need for an affirmative consent standard can also be seen in a New York Times Magazine article entitled *The St. Paul's Rape Case Shows Why Sexual-assault Laws Must Change*.[66] The article discusses the defendant's trial for the crime of sexual assault. The trial hinged on whether there was consent or not during the sexual activity.[67] This is important because in the majority of jurisdictions, this defendant would not be standing trial due to the lack of force.[68] This is a very unique situation that demonstrates why there needs to be a change in how sexual assault crimes should be analyzed by the courts. This is because justice has not been effectively served up to this point, as many perpetrators have been able to evade justice because the sexual assault crime was analyzed too narrowly. An example of this type of situation is in the *Vantreece* case.[69] Since rape has historically been analyzed too narrowly, without much attention typically paid to the consent element, this has caused many perpetrators to escape punishment because their crime did not meet all the elements of the crime. It has been previously elucidated that as a result of this injustice, many female victims feel like they are not equally protected by the law. These cases demonstrate why women do not see themselves as fairly represented by the legal system when it comes to sexual assault crimes.

As has been previously stated, many higher education institutions have adopted the affirmative consent standard. Some state legislatures have also attempted to pass legislation that would offer campuses further help in implementing their affirmative consent policies. For example, just this year, the Minnesota Legislature introduced S.F. 187.[70] This bill would provide funds to help schools add the affirmative consent standard to their curriculum and

66. Emily Bazelon, *The St. Paul's Rape Case Shows Why Sexual-assault Laws Must Change*, N.Y. TIMES MAG. (Aug. 26, 2015), http://www.nytimes.com/2015/08/26/magazine/the-st-pauls-rape-case-shows-why-sexual assault-laws-must-change html.

67. *Id.*

68. *See* Fried, *supra* note 53, at 1298–99.

69. *See* State v. Vantreece, 2007 ND 126, 736 N.W.2d 428.

70. S.F. 187, 91st Leg., Reg. Sess. (Minn. 2019).

provide money to help implement this standard effectively.[71] Other states have attempted to pass similar legislation to help universities in their states implement affirmative consent standards.[72] This is critical to effective reform because it helps implement affirmative consent standards on campuses—where they are most needed—even if the states are still unwilling to pass a sweeping statute adopting the affirmative consent standard within the jurisdiction itself. However, some states such as California and New York have passed legislation to make the affirmative consent standard a statewide law.[73] It is thanks to advocacy groups like RAINN and other activists that progress has been made in the adoption of affirmative consent standards in at least some states. It is this form of progress that represents the direction sexual assault laws should be moving towards in America.

In an interview with Meredith Larson, a prosecutor with the State's Attorney's office in Grand Forks, North Dakota, the affirmative consent standard was discussed.[74] Meredith Larson discussed how she felt that the affirmative consent standard would be a step in the right direction.[75] As in other jurisdictions, consent in rape cases is currently an issue of contention in North Dakota, most clearly illustrated by *Vantreece*.[76] This case demonstrated how North Dakota's laws do not properly serve justice because of the significance of the force element. The laws are too narrowly construed and focused on outdated standards, resulting in insufficient or nonexistent punishment for a defendant, even those whose conduct was found to be reprehensible. Because of this, the potential still exists for victims in North Dakota to feel like they have a duty to fight back against their attackers to successfully prove a rape charge, and this could be a contributing factor for the low reporting rate.[77] Meredith Larson stated that she feels this issue is especially prevalent for college-aged and other young adults.[78] She mentioned how an affirmative consent standard would be helpful because there were many cases she could not prosecute because there was not enough evidence of force to prove the case.[79] Her valuable insight in this interview demonstrates why the

71. *Id.*

72. *Affirmative Consent Campus Policy Report*, *supra* note 60.

73. *Id.*

74. Interview with Meredith Larson, Assistant State's Attorney, Grand Forks County, North Dakota (Oct. 23, 2015).

75. *Id.*

76. *See* State v. Vantreece, 2007 ND 126, 736 N.W.2d 428.

77. *Facts and Resources on Sexual Violence in North Dakota*, CAWS N.D., http://www.cawsnorthdakota.org/index.php/aboutus/ (last visited Apr. 2, 2019).

78. Interview with Meredith Larson, *supra* note 74.

79. *Id.*

affirmative consent standard should be adopted fully. More victims would receive the justice they deserve and the full and fair protection of the legal system.

For these reasons, the best course of action would be to abandon the force element completely. This includes the intrinsic force element analysis because even though it is a better regime than the extrinsic force analysis, it still places too much emphasis on a subjective force analysis that often makes it more difficult for a victim to prove the charge. Ideally, states should replace the force element with the affirmative consent standard. As has been previously stated, other jurisdictions have been moving towards this type of standard. Dozens of universities have also been adopting affirmative consent policies. An affirmative consent standard would be the best way to help remedy the injustice of prior rape laws. It would increase the reporting rates because of the clear delineation of what is and what is not sexual assault, which would in turn cause more perpetrators to be properly punished. This would give victims a renewed confidence in the justice system. Furthermore, victims from previously marginalized groups in society would feel like they are valued and protected. Even though there are numerous benefits to adopting this standard, there are arguments that others would make against adopting the affirmative consent standard.

## V. ROADBLOCKS ALONG THE WAY

Opponents of the affirmative consent standard being adopted have a few common arguments. Opponents often assert that the standard is too strict and does not take into account potentially false claims of rape.[80] Furthermore, opponents argue that affirmative consent would impede the natural seduction and gameplay that occurs when men and women seek to engage in sexual intercourse. However, these arguments are not as imposing as the opponents make them out to be. Furthermore, the good that an affirmative consent standard would bring is far superior to the perceived negativity that these detractors rely on to justify their opposition.

### A. IS THE AFFIRMATIVE CONSENT STANDARD TOO STRICT?

The first argument that opponents make is that an affirmative consent standard would be too strict of a standard for the analysis of sexual assault crimes.[81] This argument claims that an affirmative consent standard would prejudice defendants and would cause people who should not be punished to be punished excessively. This approach diminishes the suffering that rape

80. *See* Dressler, *supra* note 11, at 440.
81. *See* ESTRICH, *supra* note 28, at 37.

victims have endured and instead places too much emphasis on the defendant. While it is a noble pursuit to care about the rights of defendants, it should not come at the price of serving justice for victims. The affirmative consent standard is not too strict and serves to balance the interests of victims and defendants. Mandating that one should always ask and obtain permission before pursuing sexual intercourse with another is far from a complicated rule that will ensnare unwary defendants. This is a simple concept, and many who work on affirmative consent policies help make it less complicated by creating examples that show what consent looks like and what lack of consent looks like.[82] The simple idea of consent combined with further education would help individuals – both victims and defendants – understand and follow the law in a way that would reduce sexual violence and improve society.

In the interview with Meredith Larson, she stated that giving prosecutors the discretion to charge some perpetrators with lesser offenses when the sexual assault was less egregious would help.[83] This would make a new affirmative consent standard less strict and would still allow perpetrators to be properly punished and for justice to be served for the victims. Therefore, with proper analysis, the ability to pursue less serious charges for less serious offenses, and a clear set of rules for what is and what is not consent, an affirmative consent standard could be adopted without it being too stringent for defendants.

### B. DOES THE AFFIRMATIVE CONSENT STANDARD TAKE INTO ACCOUNT POTENTIALLY FALSE RAPE CLAIMS?

Another argument that opponents wield is that an affirmative consent standard does nothing to assist defendants who are in court because of a false rape accusation, arguing that some defendants are in court for sexual assault crimes that they did not commit. The rationale for this is that police officers arrest the wrong person or that the victim is simply lying to hurt an innocent defendant. While these instances unfortunately do happen, as the graph in Appendix B shows, the number of defendants who are falsely accused is very small compared to all the defendants who are tried for sexual assault crimes.[84]

This graph shows that the number of people who are falsely accused is miniscule compared to the number who commit rape and are able to get away

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82. *Administrative Policy: Sexual Harassment, Sexual Assault, Stalking and Relationship Violence*, UNIV. OF MINN. (Jan. 1, 2018), https://policy.umn.edu/hr/sexharassassault.

83. Interview with Meredith Larson, *supra* note 74.

84. Dylan Matthews, *The Saddest Graph You'll See Today*, WASH. POST (Jan. 7, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/01/07/the-saddest-graph-youll-see-today/.

with it, at least in part due to the way current sexual assault laws are written. In her interview, Meredith Larson stated that these fears of mistakenly charging an innocent defendant could be assuaged with more education for prosecutors.[85] With enhanced education, prosecutors could more effectively analyze a case in order to properly identify which cases contain inaccuracies or lack the evidence necessary to sustain a conviction. Furthermore, the fear of mistake is one that exists for all crimes and it is one that should be dealt with similarly to how we reduce mistakes in other matters – by giving those who enforce the law, such as lawyers, police officers, judges, and jurors more education so that they can effectuate justice while also implementing procedural safeguards and appeals to protect defendants from wrongful convictions.

### C. WOULD AFFIRMATIVE CONSENT IMPEDE SEDUCTION AND SEXUAL GAMEPLAY BETWEEN THE SEXES?

Opponents of the affirmative consent standard argue that it would impede natural seduction and sexual gameplay between the sexes.[86] This argument is that during the pursuit of sexual intercourse women often play "hard to get," and men have to keep trying to get past the initial no.[87] Opponents argue that society, along with the media, have created the idea that men have to pursue women past the initial moment in order to have sexual intercourse.[88] They argue that an affirmative consent standard would unfairly punish men who are simply acting as they have been taught by the media. While this argument is not unfounded, as the media often does portray this, an affirmative consent provision should still be adopted. Richard Klein states, "[T]hat's why an affirmative indication of consent is required; no assumptions ought to be made. If the law makes this clear to men, then men will act far more cautiously, respectfully, and judiciously."[89] An affirmative consent provision would cause men to act more appropriately in their pursuit of sexual intercourse, a clear reaction to the increased consequences for bad behavior. Affirmative consent provisions adopted by universities are also helpful despite not being a criminal standard, particularly because this standard can be used to teach both men and women the boundaries of appropriate sexual behavior during a formative time in their lives. The standard provides a clear set of guidelines for what affirmative consent is and how to obtain it, which

85. Interview with Meredith Larson, *supra* note 74.

86. Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1011 (2008).

87. *Id.* at 1012.

88. *Id.* at 1011–13.

89. *Id.* at 1013.

is both helpful and necessary for college students in their pursuit of sexual intercourse.

For these reasons, the arguments made by those opposed to the affirmative consent standard are not adequate. An affirmative consent standard would create a fairer system of sexual assault laws for victims and a clear set of guidelines for offenders. It would not be too strict because with different offense levels that prosecutors could charge, the affirmative consent standard would make sure that as many perpetrators as possible are justly punished according to the severity of their crime. The standard also would not be too complicated because with more education, especially on university campuses, we could help everyone understand the concept of consent. Furthermore, parties would also understand the correct avenue for obtaining consent before engaging in sexual intercourse. The presence of consequences for not obtaining affirmative consent would also curb the negative portrayal of seduction and sexual gameplay that is present in the media. More education for prosecutors and the legal system would also mitigate the argument that this standard would result in increased convictions of innocent defendants. It would enable the people who analyze and enforce sexual assault laws to be able to properly decide which cases should be brought to trial, and they would be able to protect the very small number of people who are charged with sexual assault mistakenly.

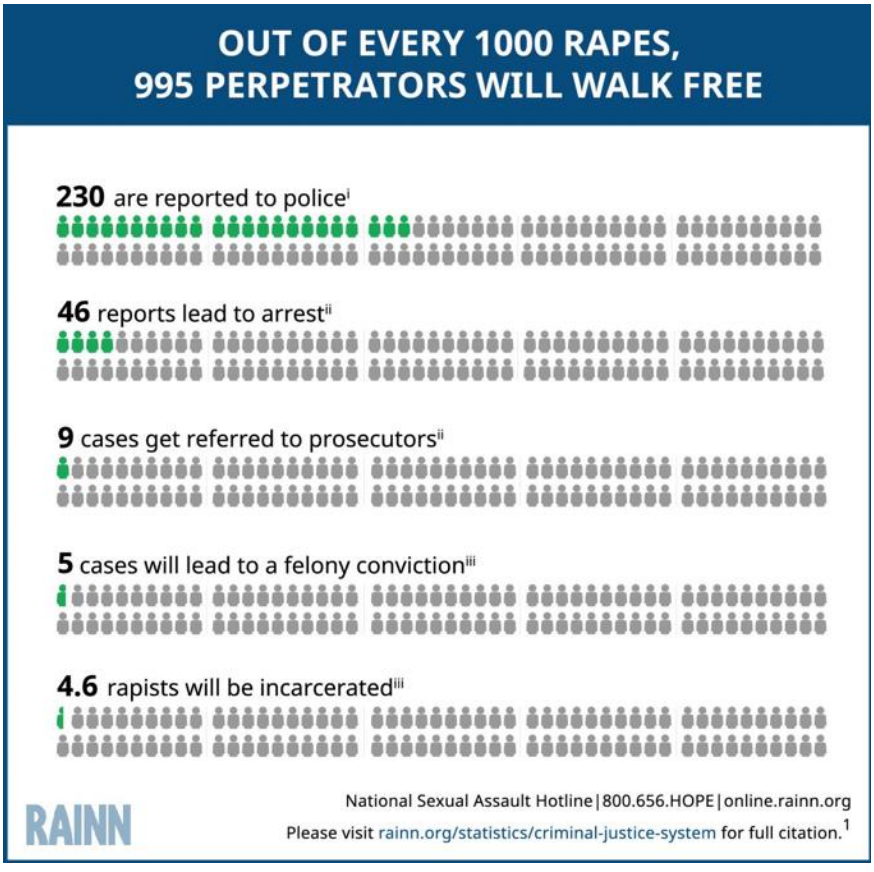
## VI. CONCLUSION

A great amount of progress has been made in relation to sexual assault laws. This can be seen in the weakening, and in some states the outright removal, of the resistance requirement. However, the force element has grown in importance out of the decay of the resistance requirement, and this has been a step in the wrong direction. The majority of states still analyze sexual assault crimes using the extrinsic force standard, with the minority of states pushing towards an intrinsic force standard. Even though the move toward the intrinsic force requirement is an improvement, courts and legislatures should be analyzing consent rather than force standards.

The best course of action would be to replace the force requirement with the affirmative consent standard. As has been previously stated, other jurisdictions, especially universities, have been pushing toward this type of standard. An affirmative consent standard would be the best way to help remedy the injustice of prior rape laws. It would help victims obtain justice and would set clear standards to allow for those who commit sexual assault to be punished appropriately. Many of the arguments that opponents of the affirmative consent standard present are not as formidable as they appear and can be easily circumvented with proper education and training for law enforcement and

prosecutors. It is critical to remember that while the rights of defendants are important in our justice system, it is for victims and the betterment of society that we implement criminal laws. When we remember this and all the good that an affirmative consent standard could accomplish, we see the importance of working towards implementing it on a statewide level across the country. In the best interest of justice, and for the equal protection of the law for all of this country's citizens, states should adopt the affirmative consent standard over the current force standard.

APPENDIX A[90]

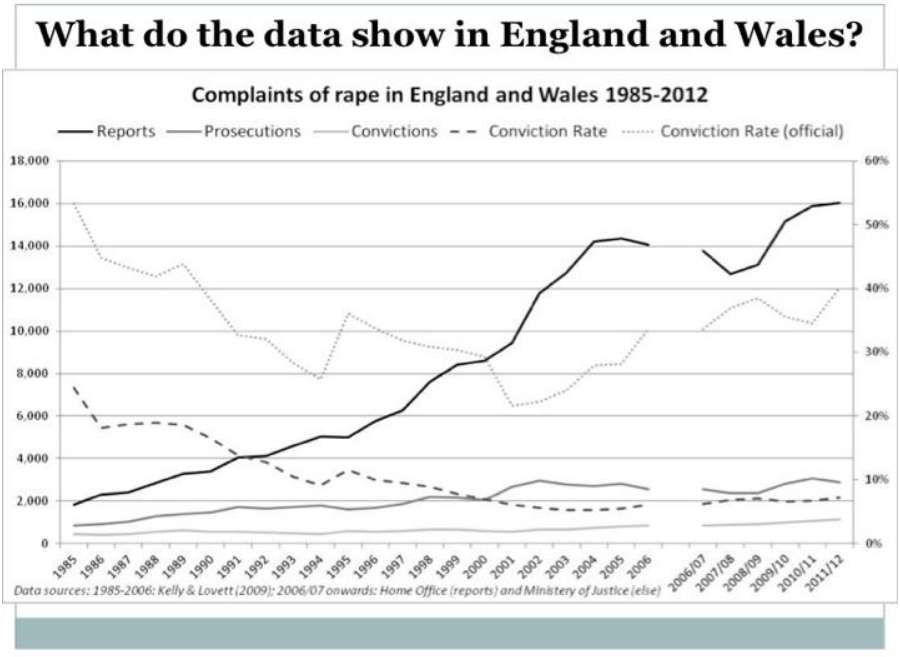



90. *The Criminal Justice System: Statistics*, RAINN, https://www rainn.org/statistics/criminal-justice-system (last visited Apr. 3, 2019).

## APPENDIX B[91]


91. Dylan Matthews, *The Saddest Graph You'll See Today*, WASH. POST (Jan. 7, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/01/07/the-saddest-graph-youll-see-today/.

APPENDIX C[92]




92. Melanie Newman, *Revealed: Why The Police Are Failing Most Rape Victims*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 28, 2014), https://www.thebureauinvestigates.com/2014/02/28/revealed-why-the-police-are-failing-most-rape-victims/.