

THE PUBLIC PROSECUTOR'S OFFICE AND SEXUAL VIOLENCE
IN THE UNITED STATES: A CIVIL AND HUMAN RIGHTS PERSPECTIVE¹

*O Ministério Público e a violência sexual nos Estados Unidos:
uma perspectiva de direitos civis e humanos*

Kenneth B. Nunn²

Professor of Law Emeritus, University of Florida Levin College of Law; Visiting Professor of Law, Howard University School of Law, 2023-25; A.B., 1980, Stanford University; J.D., 1984, University of California, Berkeley School of Law.

ABSTRACT

This article argues that rape and sexual assault, and more importantly the non-prosecution of sexual assault claims, should be understood as civil and human rights violations. The article discusses the definition of rape and some of the key attributes of the crime. The article examines how the definitions of rape and sexual assault have changed over time, both internationally and domestically in the United States, chiefly due to the intervention of the feminist movement. Consequently, the article shows that rape prosecutions are more likely to be successful when more modern definitions of rape are utilized. The article examines how rape prosecutions are conducted in the United States and describes obstacles to the proper execution of sexual assault cases brought by prosecutors in the United States. Finally, the article suggests several actions that prosecutors' offices can take to ensure human rights are enforced and respected in rape and sexual assault prosecutions.

KEYWORDS

Rape; sexual assault; sexual violence; sexual battery; crime; sex crime; prosecutors; prosecution; civil rights; human rights; rights; consent; resistance; penetration; force; threats; feminism; International Criminal Court; genitals; rape kit; victims; victim-centered; diversion; probation; restorative justice.

1 This article was originally presented as a presentation at the Comparative Analysis of Fundamental Rights Protection in Brazil and in the United States Conference, held May 22-24, 2024 at the Escola Superior do Ministério Público da União in Brasília, Brazil. I would like to thank Manoel Jorge e Silva Neto and Avis Buchanan for their contributions.

2 Autor convidado.

RESUMO

Este artigo argumenta que estupro e agressão sexual, e mais importante, a não acusação de queixas de agressão sexual, devem ser entendidos como violações de direitos civis e humanos. O artigo discute a definição de estupro e alguns dos principais atributos do crime. O artigo examina como as definições de estupro e agressão sexual mudaram ao longo do tempo, tanto internacionalmente quanto internamente nos Estados Unidos, principalmente devido à intervenção do movimento feminista. Consequentemente, o artigo mostra que os processos por estupro têm mais probabilidade de ser bem-sucedidos quando definições mais modernas de estupro são utilizadas. O artigo examina como os processos por estupro são conduzidos nos Estados Unidos e descreve os obstáculos à execução adequada de casos de agressão sexual movidos por promotores nos Estados Unidos. Finalmente, o artigo sugere várias ações que os gabinetes dos promotores podem tomar para garantir que os direitos humanos sejam aplicados e respeitados em processos por estupro e agressão sexual.

PALAVRAS-CHAVE

Estupro; abuso sexual; violência sexual; agressão sexual; crime; crime sexual; promotores; acusação; direitos civis; direitos humanos; direitos; consentimento; resistência; penetração; força; ameaças; feminismo; Tribunal Penal Internacional; genitais; kit de estupro; vítimas; centrado na vítima; desvio; liberdade condicional; justiça restaurativa.

INTRODUCTION

Rape is extremely prevalent and presents a serious social concern³. Globally, one-third of women and girls are subjected to rape or attempted rape⁴. In the U.S., one in five women and girls are victims of sexual assault or rape⁵. Rape is not only a crime against women. In the U.S., 1 in 13 men are victims of sexual assault⁶. Overall, there are over 530,000 incidents annually of sexual assault or rape of people 12 or older in the U.S.⁷. There are 74,930 incidents annually of sexual assault or rape of people 12 or older in Brazil⁸.

Although rape is quite prevalent, about 60 percent of rapes in the U.S. go unreported⁹. This is due to many reasons, including fear, embarrassment, trauma, loyalty toward or fear of the perpetrator, distrust in the criminal legal system, and the belief that the criminal legal system is an inappropriate vehicle for resolving their experiences of violence¹⁰. And while it is true that men are victims of rape as well, it is also true that more than 90 percent of the victims of sexual violence are female¹¹. Consequently, the assessment that rape is often a specific form of violence against women should not be overlooked.

-
- 3 See Equality Now, *The World's Shame: The Global Rape Epidemic 5* (2017), (July 28, 2024) <https://tinyurl.com/ahpybwdt> / [hereinafter cited as "The World's Shame"].
 - 4 Dubravka Simonović, *Rape as a Grave, Systematic and Widespread Human Rights Violation, a Crime and a Manifestation of Gender-Based Violence Against Women and Girls, and Its Prevention*, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. Human Rights Council, para. 9, U.N. Doc. A/HRC/47/46 (April 19, 2021) [hereinafter cited as "Rape as a Human Rights Violation"].
 - 5 Leemis R.W., Friar N., Khatiwada S., Chen M.S., Kresnow M., Smith S.G., Caslin, S., & Basile, K.C., *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention 5 (2022).
 - 6 *Id.*
 - 7 Alexandra Thompson and Susannah Tapp, *Criminal Victimization, 2022*, Bureau of Justice Statistics, U.S. Dept of Justice 3 (2023).
 - 8 Fórum Brasileiro de Segurança Pública. 17º Anuário Brasileiro de Segurança Pública. São Paulo: Fórum Brasileiro de Segurança Pública 147 (2023) (July 28, 2024), <https://tinyurl.com/5bywvk9d>.
 - 9 *Supra* note 4, at 1. A six-site study, conducted 2014, showed that between 80 and 89 percent of rape cases reported to the police were never referred or were declined for prosecution.
 - 10 Jennifer Long, Patti Powers, Holly Spainhower, and Jen Newman, *Seeking Justice Through Sexual Violence Prosecutions*, in *Sexual Assault and Reforming the Response to Rape* (Rachel E. Lovell & Jennifer Langhinrichsen-Rohling eds., Routledge, 2022), reprinted in *Strategies: The Prosecutors' Newsletter on Violence Against Women*, No. 19, *AEquitus*, 3 (November 1922) [hereinafter cited as "Seeking Justice"].
 - 11 Office of Justice Programs, *Female Victims of Sexual Violence, 1994-2010* Bureau of Justice Statistics, Department of Justice (2013); National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998). See also Rape, Abuse, and Incest National Network (RAINN), *Scope of the Problem: Statistics* (July 28, 2024), <https://tinyurl.com/g6cacaj4>.

In the following pages, I will examine civil and human rights issues raised by the prosecution of sexual assault¹² cases in the United States. First, I would like to frame sexual assault, and more importantly the non-prosecution of sexual assault claims, as civil and human rights violations in their own right. Second, I will discuss the definition of rape and show some of the key attributes of the crime. Third, I will examine how the definitions of rape and sexual assault have changed over time, both internationally and domestically in the United States, chiefly due to the intervention of the feminist movement. Fourth, I will describe some obstacles to the proper execution of sexual assault cases faced by prosecutors in the United States. Finally, I will suggest a number of actions that prosecutors' offices can take to ensure human rights are enforced and respected in rape and sexual assault prosecutions.

1 SEXUAL ASSAULT AS A CIVIL AND HUMAN RIGHTS ISSUE

The story of Recy Taylor illustrates many of the human rights concerns raised by prosecutors' treatment of sexual assault and emphasizes the centrality of sexual assault to the civil rights movement in the United States. Recy Taylor was a 24-year-old wife, mother, and sharecropper, living during the height of racial segregation in Abbeville, Alabama¹³. On September 3, 1944, Taylor was walking home after attending evening services at the Rock Hill Holiness Church in Abbeville¹⁴. As she made her way down a dark, tree-lined street, seven white men accosted her¹⁵. They were armed with knives and shotguns, and they ordered the young woman into their car, a green Chevrolet¹⁶. After taking her to a secluded spot, six of the seven men raped her, beat her, and left her for dead¹⁷. Recy managed to make it back toward town, where she was spotted by her husband and the local sheriff who were out looking for her¹⁸. The car was identified by a companion who was with Taylor at the time of her abduction, and the owner named the men who were responsible for the abduction and rape¹⁹. The men quickly confessed to the crime, but no charges were ever brought against them²⁰.

12 I use "rape" and "sexual assault" interchangeably in this article. Generally, "rape" is the more specific term that refers to sexual penetration by force or threat. "Sexual assault," on the other hand, is a broader term that covers rape as well as sodomy and other forms of unwanted sexual touching. See Shiwali Patel, Elizabeth X. Tang, Hunter F. Iannucci, *A Sweep as Broad as Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La. L. Rev. 939, 947–48 (2023) (defining rape as a type of sexual assault).

13 Danielle L. McGuire, *At the Dark End of the Street: Black Women, Rape, and Resistance – A New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power* 8 (2010).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 Sewell Chan, "Recy Taylor, Seeker of Justice, Is Dead at 97," *N. Y. Times* (December 29, 2017), at D7.

Contacted by friends of the Taylor family, the president of the Montgomery, Alabama, chapter of the NAACP sent his best investigator and organizer to Abbeville²¹. Her name was Rosa Parks. Known as the “mother of the civil rights movement” for her actions during the Montgomery Bus Boycott²², Parks and other activists established the Alabama Committee for Equal Justice for Taylor and garnered support from women’s groups, national labor unions, and African-American civic organizations²³. “The group recruited supporters across the U.S., and by the spring of 1945 they had organized what the Chicago Defender called ‘the strongest campaign for equal justice to be seen in a decade²⁴.’” Consequently, Rosa Parks’ first contribution to civil rights in America was not her arrest on a bus in 1955, but her work as a sexual violence activist a decade earlier.

The rape of Black women was all too common in the American South, and whites were rarely punished²⁵. This fact stirred resentment and protests in African American communities, as well as a coordinated push for change²⁶. Much of the organizing and activism that contributed to the civil rights movement came about directly as a result of these protests or relied on the networks and organizational capacity the protests engendered²⁷.

In addition to its impact on the American civil rights movement and the understanding that the failure to prosecute sexual violence crimes is a violation of civil rights, rape is recognized as violative of international human rights as well. As Dubravka Simonović, U.N. Special Rapporteur on Violence Against Women, stated in her report to the U.N. Human Rights Council:

Currently, the international human rights framework and jurisprudence recognizes rape as a human rights violation and a manifestation of gender-based violence against women and girls that could amount to torture. Under international humanitarian law and international criminal law, rape can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide when the other elements of the crimes are present²⁸.

Rape violates a range of human rights, including; (1) the right to bodily integrity; (2) the rights to autonomy and to sexual autonomy; (3) the right to privacy; (4) the right to the highest attainable standard of physical and mental health; (5) women’s right to equality before the law; (6) the right to be free from violence; (7) the right to be free from discrimination; and (8) the right to be free from torture and other cruel or inhuman treatment²⁹.

21 McGuire, *supra* note 12.

22 See Public Law 106-26, 113 Stat. 50 (May 4, 1999) (awarding a Congressional gold medal to Rosa Parks and honoring her as the “mother of the civil rights movement”).

23 *Supra* note 12, at 13.

24 *Id.*

25 Danielle L. McGuire, “It Was Like All of Us Had Been Raped”: Sexual Violence, Community Mobilization, and the African American Freedom Struggle, 91-3 *J. of Am. Hist.* 906, 909 (Dec. 2004).

26 *Id.*

27 See *id.* at 912 (arguing rape of Gertrude Perkins contributed directly to the Montgomery Bus Boycott).

28 Rape as a Human Rights Violation, *supra* note 4, para. 9.

29 *Id.* at para. 20.

2 DEFINING RAPE

The term "sexual assault" covers a wide range of sexual violence offenses which vary across the different American jurisdictions. "Rape" is usually the most serious of these offenses. Again, the precise definition of rape varies from jurisdiction to jurisdiction (and the most serious sex crime in the jurisdiction may not be called "rape," but "sexual assault" or "sexual battery"),³⁰ but most often the definition of rape includes these four elements: (1) penetration (or intercourse); (2) force; (3) nonconsent; and (4) resistance by the victim³¹. I will examine each of these elements below.

Different jurisdictions use different standards for "penetration"³². Some jurisdictions restrict the term to reference only vaginal penetration³³. Others include oral and/or anal penetration³⁴. Many jurisdictions criminalize sexual touching of any kind, but this usually carries a lesser penalty than rape defined as involving some form of penetration³⁵. Of course, the broader the definition, the more protective it is of a woman's bodily autonomy³⁶.

There are also differing standards for "force," ranging from physical force, to threats, to psychological coercion. The strictest definitions of force require physical force sufficient to overcome the victim's "resistance to the utmost"³⁷. Indeed, this was the traditional definition of rape adopted from the common law³⁸. More moderate treatments of force require only "reasonable resistance"³⁹. A related question is whether verbal resistance is sufficient. A small minority of jurisdictions do not require resistance to be proven at all⁴⁰. In these states, the jury must focus on the acts of the perpetrator and not the acts of the victim and the presence of resistance is merely evidence of the use of force and not a requirement⁴¹. Some jurisdictions allow the force requirement to be met by such acts as removing a victim's clothing. The most minimal definitions of force allow a finding a rape to occur based only upon "the amount of force inherent in the performance of the act," such as opening the victim's legs⁴².

30 See generally, Shiwali Patel et al., *supra*, note 1. See also, *What Constitutes the Offense of Sexual Battery?* 87 A.L.R.3d 1250 (Originally published in 1978) (2024).

31 See generally, Joshua Dressler, *Understanding Criminal Law* 584-88 (5th ed. 2009).

32 Lundy Langston, *No Penetration - and It's Still Rape*, 26 Pepp. L. Rev. 1, 13 (1999).

33 *Id.*

34 Joseph E. Kennedy, *Criminal Law: Cases, Controversies and Problems* 781 (2019).

35 Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 Harv. J. L. & Gender 263, 268 (2012).

36 *Id.* at 267-273.

37 Stacy Futter and Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 Berkeley Women's L.J. 72, 75 (2001).

38 *Id.*

39 See Dressler, *supra* note 30, at 590-91.

40 *Id.*

41 *Id.* at 591.

42 *Id.* at 592.

The use of threats almost everywhere obviates the need for physical force⁴³. The issue here is whether the threat must be a threat of bodily harm, death, or serious bodily harm, or is any kind of threat, strong enough to overcome a reasonable person's resistance, sufficient. Most jurisdictions require the threat to be one that a reasonable person would heed⁴⁴. Related to threats is the use of mental or psychological coercion⁴⁵. A small minority of jurisdictions allow coercive behavior short of actual threats, such as causing the victim financial or reputational harm, sufficient to support a rape conviction⁴⁶.

Lack of consent is always a requirement for rape convictions⁴⁷. Consent can be conceptualized in four ways: (1) affirmative consent (i.e., "Yes"); (2) absence of verbal resistance (i.e., "No"), plus other behavior suggestive of consent (e.g., smiling); (3) absence of verbal resistance (i.e., "No") only; and (4) absence of verbal resistance (i.e., "No"), plus passivity, silence or ambivalence⁴⁸. The above definitions are ordered (1) to (4) to illustrate an increasing burden to the prosecution to establish consent. Affirmative consent (1) is more favorable for victims, while allowing passivity, silence or ambivalence to show consent (4) is more favorable for defendants. Most jurisdictions in the U.S. do not require affirmative consent⁴⁹, but they also do not adhere to a precise definition of consent and simply instruct juries that to convict they must find that the defendant's behavior was not consented to by the victim⁵⁰.

3 FEMINIST ADVOCACY AND THE DEFINITION OF RAPE

In the 1970s the definition of rape began to be affected by scholarship and advocacy from feminist perspectives⁵¹. Feminist and feminist groups argued that the criminal legal system was biased against women and that this bias could be especially observed in the way that female rape victims were treated and by the way that requirements for proof assumed that women were untrustworthy witnesses when it came to sexual assault⁵².

43 *Id.* at 587.

44 *See id.* at 588.

45 *See id.* at 592.

46 *Id.* at 593.

47 *Id.* at 585.

48 *See* Sanford Kadish, Stephen Schulhofer, Carol Steiker, Rachel Barkow, *Criminal Law and Its Processes: Cases and Materials* 377 (9th ed. 2012).

49 C. Ashley Saferight, *Clear As Mud: Constitutional Concerns with Clear Affirmative Consent*, 67 *Clev. St. L. Rev.* 431, 438 (2019) ("While most U.S. jurisdictions do not use affirmative consent to describe the legal consent element, New Jersey, Illinois, Washington, and Wisconsin all incorporate language requiring "freely given agreement" for sexual contact.").

50 *See* Jonathan Witmer-Rich, *Unpacking Affirmative Consent: Not As Great As You Hope, Not As Bad As You Fear*, 49 *Tex. Tech L. Rev.* 57, 83 (2016) (noting that "[i]n many cases... the dispute is not over silence alone but over the complainant's silence or passivity when viewed in combination with earlier words or conduct that the defendant claims indicated affirmative agreement.").

51 *See* Futter & Mebane, *supra* note 36, at 72-73.

52 *See id.* at 78-79.

In so far as the definition of rape is concerned, feminists argued that a broader definition of intercourse, one that was not limited to penetration, should be the standard⁵³. From a feminist viewpoint, any nonconsensual sexual touching should be criminalized. Feminists also argued that the force requirement should be either eliminated or interpreted in a way that minimal amounts of force would be sufficient to constitute rape⁵⁴. As to consent, the feminist position was that affirmative consent should be required and that lesser conceptions of consent failed to protect women's bodily autonomy and right to choose. In the feminist view, rape should no longer be viewed as chiefly a crime of violence. It is the nonconsensual nature of rape that is the chief harm to women⁵⁵. Finally, feminists sought to eliminate the resistance requirement altogether⁵⁶. Feminists argued that the assumptions underlying the resistance requirement—that women are untrustworthy witnesses of assailant's behavior, that they have reasons to lie, and that they may have knowingly or unknowingly encouraged the assailant—are offensive to women and discriminatory⁵⁷.

The success of the feminist argument in U.S. criminal law can be seen in several statutory reforms that began unfolding in the 1970s and continue to this day. Illustrative is the Florida sexual battery statute, Florida Statute § 794.011⁵⁸. That statute makes sexual battery (rape) a life felony if the perpetrator uses or threatens to use a deadly weapon or if the perpetrator uses "actual physical force likely to cause serious personal injury"⁵⁹. But subsection (5) of that provision criminalizes nonconsensual sex, although at a lower grade, and dispenses entirely with the need to prove force or resistance⁶⁰.

Several international instruments addressing the crime of rape have incorporated the feminist viewpoint. One such instrument is the Rome Statute of the International Criminal Court, which highlights the absence of consent in its definition of rape. According to the Rome Statute, rape can be accomplished "by taking advantage of a coercive environment," even if force or threats were not used⁶¹. Moreover, the Rome Statute has a relaxed approach to force and allows a finding of rape based on "psychological oppression or abuse of power"⁶². Finally, it is important to note the broad definition of penetration that is used in the

53 *Id.* at 78.

54 *See Dressler, supra* note 30, at 591.

55 *Id.* at 581.

56 *See id.* at 591.

57 *See Margot Brooks, But She Didn't Fight Back: Rape Law's Lingering Resistance Requirement and the Need for Its Elimination*, 55-3 *Crim. Law Bull. Art. 3* (2019) (arguing a "foundational element in the construction of rape law is societal distrust of women").

58 FL. ST. § 794.011 (West 2023).

59 FL. ST. § 794.011(3) (West 2023).

60 FL. ST. § 794.011(5) (West 2023).

61 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], article 7 (1) (g).

62 *Id.*

Rome Statute. That statute defines the crime as “conduct resulting in penetration, however, slight, of any part of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object of any part of the body”⁶³. Under the Rome Statute, then, digital insertion would be sufficient to qualify as rape.

Although the Rome Statute and the Florida law are examples of the influence of feminist perspectives, they are exceptions. Most states define rape to require force and resistance, and even when this is not the case, force and resistance remain important considerations in the treatment of the case⁶⁴. Likewise, although the Rome Statute and many instruments in international law dispense with the force requirement, that is not the case in the domestic law of most of the countries in the world⁶⁵. As a general rule, then, rape retains the classic elements: (1) intercourse or penetration; (2) force or threats; (3) lack of consent; and (4) reasonable resistance.

4 OBSTACLES TO THE EFFECTIVE PROSECUTION OF RAPE CASES IN THE U.S.

Even given favorable case law in U.S. jurisdictions that should make it easier for prosecutors to secure rape convictions, several barriers to effective rape prosecutions may remain. These include the influence of societal myths and gender-based stereotypes regarding rape victims, the abuse of prosecutorial discretion, and prosecutors’ failure to obtain cooperation from victims of sexual violence. Sometimes the myths affect jurors, but they may also impact the decisions made by police, prosecutors, judges, and other criminal legal system actors. For example, a prosecutor’s decision not to prosecute may be due to the character, age, or other features of the victim or due to the perceived lack of gravity of the offense as seen by someone influenced, consciously or unconsciously, by stereotypes about rape victims⁶⁶.

Another reason sexual assault laws lose effectiveness is that the rates of arrest, prosecution, and conviction are exceptionally low. One study found between 80 and 89 percent of cases reported to the police were either never referred to the prosecutor’s office or were declined for prosecution⁶⁷. Prosecutors fail to prosecute rape cases for several reasons, including reliance on credibility assessments grounded on myths regarding sexual violence, unconscious biases, lack of information and training about sexual violence, resource shortages in prosecution agencies, and concerns over conviction rates⁶⁸.

63 *Id.*

64 See Dressler, *supra* note 30, at 590-91.

65 The World’s Shame, *supra* note 3.

66 See Seeking Justice, *supra* note 10.

67 Rebecca Campbell *et al.*, *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, 20(5) *Violence Against Women* 607-25 (2014), <https://tinyurl.com/27vhusbt>.

68 *Id.*

Additionally, a key reason for low rape prosecution rates in the United States is the ongoing rape kit backlog. A rape kit is a package of materials used for the collection of forensic evidence to be used in the prosecution of a rape case. Following the report of a sexual assault, the victim may undergo an invasive, four-to-six-hour examination by a doctor or nurse. The medical profession will preserve the collected evidence in the rape kit. A rape kit may include tubes and containers for blood and urine samples, paper bags for collecting clothing and other physical evidence, cotton swabs, glass slides, etc.⁶⁹.

A rape kit backlog occurs when evidence has been collected, but not submitted to a lab for testing, or must wait in a queue before testing takes place. The Congressional Research Service estimates that the backlog ranges anywhere between 90,000 and 400,000 rape kits. The actual number is unknown⁷⁰. Since 2011, the U.S. government has made 1.3 billion dollars available to reduce the backlog, but despite this funding a substantial number of rape kits remain unprocessed⁷¹.

Several factors may explain the persistence of the rape kit backlog. One is that, in the absence of clear policies, whether a rape kit is tested or not is a case-by-case decision by each individual prosecutor⁷². In addition, sexual assaults may not be prioritized when it come to the expenditure of prosecutorial resources, rape cases may not be pursued due to victim blaming and stereotypes, and prosecutors may need training about rape survivors and ways to assess their credibility in a fair manner⁷³. Moreover, many offices do not even consider testing rape kits until a potential perpetrator has been identified⁷⁴.

5 WHAT PROSECUTORS' OFFICES CAN DO TO ENSURE HUMAN RIGHTS ARE ENFORCED IN RAPE PROSECUTIONS

Human rights in the context of rape prosecutions must be considered from the perspective of both the victim of the sexual assault and the person accused of committing the sexual assault. Failure to consider both perspectives can result in a violation of human rights and should be a matter of concern for every prosecutor. Consequently, I have divided the recommendations that follow into two sections: victim-centered approaches and defendant-centered approaches.

69 See *What Is a Rape Kit and Forensic Medical Examination, End the Backlog* (July 28, 2024), <https://tinyurl.com/y56jafvt>.

70 See Emily J. Hanson, *Sexual Assault Kits (SAKs) and the Backlog of Untested Sexual Assault Evidence: In Brief*, Congressional Research Service, Washington, DC (February 7, 2022), <https://tinyurl.com/fn5um9jr>.

71 See *How Many Rape Kits are Awaiting Testing In the US? See the Data by State, USA Facts* (July 28, 2024), <https://tinyurl.com/y7t93dzp>.

72 See *Why the Backlog Exists, End the Backlog* (July 28, 2024), <https://tinyurl.com/mr32a8c3>.

73 *Id.*

74 *Id.*

A. VICTIM-CENTERED APPROACHES

First of all, to ensure that the rights of victims are adequately protected, prosecutors should avoid the application of stereotyped notions of what constitutes gender-based violence against women and what women's responses to that violence should be⁷⁵. Moreover, as indicated above, some definitions of rape are more protective of women than others⁷⁶. Therefore, prosecutors in a jurisdiction that requires force as an element of rape should advocate for rape standards based on consent and not force⁷⁷. Furthermore, prosecutors should not require corroboration of a victim's testimony⁷⁸, and prosecutors' offices should provide necessary training to police officers and prosecutors on trauma and how it affects rape victims⁷⁹. Finally, prosecutors should follow a principle of "do no harm" in dealing with victims⁸⁰. This means that prosecutors should be attuned to how the prosecution of a case affects the victim emotionally, financially, and socially. If proceeding with a case would harm the victim in one of these dimensions, then the prosecutor should give serious consideration to dismissing the case, not relying on the victim's testimony, or mitigating the identified harm in other ways⁸¹.

To further protect victims' interests, prosecutors should involve a victim's advocate whenever meeting with victims⁸². A victim's advocate can provide emotional support and encour-

75 See U.N. Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation 35, para 26.c., U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).

76 See notes 46-49, *supra*, and accompanying text.

77 This recommendation is included in the 2021 report of Dubravka Šimonović, the U.N. Special Rapporteur on Violence Against Women. See *Rape as a Human Rights Violation*, *supra* note 27, at para. 85.

78 *Id.* at para. 100.

79 See *id.* at para. 116; Seeking Justice, *supra* note 10, at 4 (asserting that a "trauma-informed approach requires prosecutors to understand how trauma affects victims of sexual violence").

80 Long *et al.* argue that that prosecutors should function with the needs of the victim foremost in mind. They state the following in an article adopted from materials created to be a model resource for prosecutors trying sexual violence cases:

Prosecutors should understand that, although they have a duty to seek accountability for offenders, pursuit of this duty cannot come at the expense of the victim's well-being. This means that practices recognized as harmful to victim safety, such as the use of material witness warrants, should be reserved for the most serious of cases and under extreme circumstances, if at all. It also means that victims should have access to civil attorneys and community-based professionals who can maintain victim confidentiality and zealously advocate for the victim's interests, which may sometimes run counter to the prosecutor's.

Seeking Justice, *supra* note 10, at 5.

81 Indeed, the federal prosecutor's manual of the U.S. Department of Justice says the following:

"It is important to consider the economic, physical, and psychological impact of the offense, and subsequent prosecution, on any victims. It is appropriate for the prosecutor to take into account such matters as the seriousness of the harm inflicted and the victim's desire for prosecution."

U.S. Department of Justice Manual § 9-27.230(8) (Nov. 2015).

82 Wisconsin Coalition Against Sexual Assault, *Wisconsin Adult Sexual Assault Response Team Protocol 22* (2011), <https://tinyurl.com/muyc9hfc>.

age the victim to share details that are important to reviewing and potentially charging the case⁸³. Prosecutors should meet with the victim prior to making a determination concerning charges⁸⁴. Beyond that, it is the prosecutor's responsibility to notify a sexual assault victim that a decision has been made to not charge the case⁸⁵. The notification should occur promptly and, if possible, before the accused is notified⁸⁶. The notification should include a clear and honest explanation of the reasons for the decision not to charge⁸⁷. Prosecutors should also notify victims about the possibility of media presence in the courtroom and inform them of the rules regarding limitations on publicity regarding the victim⁸⁸.

Prosecutors should seek to understand the victim's emotional, psychological, and cognitive limits⁸⁹. Victims who are unable to (or decide not to) participate in the prosecution of a case are entitled to the same dignity and respect as victims who are fully able and willing to participate⁹⁰. So naturally, prosecutors should prioritize the participation of victims in deciding the government's recommendations for potential outcomes⁹¹. If a settlement is being negotiated, prosecutors should explain the rationale for seeking a settlement and ask victims for their feedback on the available options under consideration⁹².

Prosecutors can also aid victims through strengthening the effectiveness and efficiency of their offices. Prosecutors' offices should seek to have the same prosecutor—one who has specialized training in sensitive crime issues—handle the case from beginning to end⁹³. This is called "vertical prosecution" and ensures not only that the victim can establish a relationship with a specific member of the prosecution team, but also that the prosecution can proceed with greater efficiency⁹⁴. Prosecutors should establish specialized units to handle sexual assault and intimate violence cases⁹⁵. This can also increase efficiency and allow line prosecutors to develop expertise⁹⁶.

83 *Id.*

84 *Id.* See also U.S. Department of Justice, Framework for Prosecutors to Strengthen Our National Response to Sexual Assault and Domestic Violence Involving Adult Victims 9 (May 2024), <https://tinyurl.com/yan24m4n> [hereinafter Framework for Prosecutors].

85 Wisconsin Coalition Against Sexual Assault, *supra* note 81, at 24.

86 *Id.*

87 *Id.*

88 *Id.* at 25.

89 *Id.*

90 *Id.* at 28.

91 *Id.* at 30; Framework for Prosecutors, *supra* note 83 at 19.

92 *Id.*

93 Wisconsin Coalition Against Sexual Assault, *supra* note 81, at 22.

94 Kay L. Levine, *The New Prosecution*, 40 Wake Forest L. Rev. 1125, 1141 (2005) (describing vertical prosecution model as applied to statutory rape prosecutions).

95 Seeking Justice, *supra* note 10, at 6.

96 *Id.*

Prosecutors can also limit the trauma and burden of rape prosecutions for victims through partnerships with other authorities and service providers⁹⁷. Prosecutors should work collaboratively with other professionals outside of the criminal system, such as civil and victims' rights attorneys, faith-based providers, grant administrators, and policy makers⁹⁸. Prosecutors should also work collaboratively with other professionals within the criminal system, including law enforcement, forensic examiners, crime lab analysts, dispatchers, corrections, probation, parole, and sex offender management professionals⁹⁹. Finally, prosecutors should advocate for swift testing of rape kits and promote plans to help reduce the rape kit backlog in their jurisdiction.

B. DEFENDANT-CENTERED APPROACHES

Some readers may wonder why prosecutors should be concerned with protecting defendants' rights when approaching the prosecution of sexual assault cases from a human rights perspective. After all, the chief concern of activists like Rosa Parks¹⁰⁰ and Fannie Lou Hamer¹⁰¹ was the failure of the state to prosecute the perpetrators of rape. But rape victims are connected to others through social networks that form families, communities, and cultures. Justice is not done for them if the criminal system they turn to for relief unduly punishes or oppresses the community of which they are part. The activists who came to assist Recy Taylor used the same networks they developed to support Taylor to later defend the Scottsboro Boys, six Black youths accused of raping two white women¹⁰². Prosecutors who care about human rights must protect the human rights of defendants as well as the rights of victims¹⁰³.

Many believe that the oppressive potential of the criminal legal system is one of the most pressing human rights problems of the day¹⁰⁴. The United States currently incarcerates

97 *Id.* at 4.

98 *Id.* See also, *Advocacy Meets Prosecution: The Benefits of a Strong Partnership*, Sexual Assault Kit Initiative (July 28, 2024), <https://tinyurl.com/yxy9jr85>.

99 Seeking Justice, *supra* note 10, at 6.

100 See *supra*, notes 20-26 and accompanying text.

101 Fannie Lou Hamer was a voting rights activist, who as a rape survivor, also forcefully spoke out against sexual violence. Her "public testimony about the physical and sexual assault she received at the hands of police in the Winona [city] jail in 1963 revealed how Black women were often targeted for racial and sexual violence." Danielle L. McGuire, *Fannie Lou Hamer's Freedom Dreams*, Black Perspectives (July 30, 2024), <https://tinyurl.com/3r6pu8au>.

102 See McGuire, "It Was Like All of Us Had Been Raped," *supra* note 24.

103 In the United States, the requirement to promote human rights is in line with the prosecutor's role as a representative of a sovereignty, "whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). See also, 2017 ABA Prosecution Standards, Standard 3-1.2 ("The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.").

104 See, e.g., Lissa Griffin & Helen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 *Geo. J. Legal Ethics* 301, 302-03 (1917) (asserting that "[i]n the last decade, scholars, lawyers. Government

more than two million people¹⁰⁵ and maintains one of the highest incarceration rates in the world¹⁰⁶. Those individuals are disproportionately Black, brown, and poor¹⁰⁷. In some communities, as many as 50 percent of the male population is in prison, jail, or under some other kind of carceral control¹⁰⁸. At such levels, whole communities are forced into a cycle of poverty where the young men are unable to find gainful employment due to their criminal records¹⁰⁹. Moreover, there is little evidence to suggest that serving time in prison reduces a perpetrator's propensity to commit acts of sexual violence¹¹⁰. Prisons themselves are sites where disturbing levels of sexual violence take place. Statistics show that in the United States, one out of every 25 prisoners becomes a victim of sexual violence while in prison¹¹¹. In the face of these realities, failing to consider alternatives to incarceration is cruel and inhumane. One commentator points out the futility of current carceral policy:

The average [sexual] offender is not a serial rapist and murderer, but someone who knows their victim and is often a victim themselves, failed by a society rife with abuse and inequality. We banish this person to prison, which is itself a site of massive levels of extreme violence, sexual assault and rape¹¹².

officials, and policymakers have come to recognize that our criminal justice system is seriously dysfunctional").

105 Press Release, Joseph Biden, President of the U.S., *Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities* (Jan. 26, 2021), <https://tinyurl.com/2bwr2bus> ("More than two million people are currently incarcerated in the United States, including a disproportionate number of people of color.").

106 Emily Widra, *States of Incarceration: The Global Context 2024*, Prison Policy Initiative (July 11, 2024), <https://tinyurl.com/atdkc2ex>.

107 See Biden Press Release, *supra* note 104.

108 Bryan Stevenson, *We Need to Talk About an Injustice*, Ted.com (Mar. 2012) <https://tinyurl.com/47abxn5r>. Cited in, Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. Pitt. L. Rev. 69, 101 (2018).

109 See generally, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (rev. ed. 2012).

110 After reviewing more than 116 studies on the effects of custodial sentencing, a team of researchers found that every study reached nearly the same conclusion: "compared with noncustodial sanctions, custodial sanctions, including imprisonment, have no appreciable effect on reducing reoffending." Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, Francis T. Cullen, *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 401 (2021) (emphasis in original). If anything, the studies tend to show that "placing offenders in custody has a slight criminogenic effect." *Id.* See also, Daniel S. Nagin, Francis T. Cullen, Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 Crime & Just. 115 (2009) (asserting that "compared with noncustodial sanctions, incarceration appears to have a null or mildly criminogenic effect on future criminal behavior").

111 Allen J. Beck, Marcus Berzofsky, Racel Caspar, & Christopher Krebs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12* Bureau of Justice Statistics, U.S. Dept. of Justice (2013) at 6.

112 Sohela Surajpal, *Carceral Feminism Is Not the Answer*, *Africasacountry.com* (July 28, 2024), <https://tinyurl.com/35wj2cve>. Although Surajpal is speaking of South Africa, her comments ring true for the United States as well.

Due to these shortcomings in current incarceration-focused responses to sexual violence, prosecutors should look to other possible means of addressing the prevalence of rape and other sexual crimes. These crimes certainly should be prosecuted, but they should be prosecuted in ways that do not exacerbate the very problem the prosecution is seeking to resolve. Prosecutors, then, should be aware of and utilize alternatives to incarceration for sexual offenses when warranted, including such alternatives as diversion¹¹³, probation¹¹⁴, community release¹¹⁵ and restorative justice¹¹⁶ programs. Prosecutors should also support organizations engaged in education and training of sexual offenders and the general public regarding sex roles and appropriate conduct toward others. Such educational programs may prevent sex crimes from ever occurring.

CONCLUSION

In conclusion, rape and other forms of sexual violence are a serious problem and are recognized as human rights violations throughout the world. Yet, arrest rates, prosecution rates, and conviction rates for sexual violence are exceptionally low. The chief problem that must be overcome to ensure that the human rights of rape victims are respected are gender stereotypes and misconceptions about rape victims. As a derivative problem, rape laws are often written in ways that focus on violence and resistance and make it difficult to secure prosecutions. Resource shortages, concern over conviction rates, and rape kit testing backlogs contribute to failures to prosecute sexual offenses effectively. Yet, prosecutors' offices can take many steps to increase the effectiveness of their rape prosecutions, including the following:

113 Diversion may be defined as "the halting or suspension, before conviction, of formal criminal proceedings against a person, conditioned on some form of counter performance by the defendant. Such counter performance involves attending a program which may include treatment, counseling, and other educational devices aimed at changing the defendant's behavior." Lea L. Fields, *Pretrial Diversion: A Solution to California's Drunk-Driving Problem*, Fed. Probation, December 1994, at 20.

114 Probation may be defined as "the suspension of the imposition of a defendant's sentence or the execution of that sentence prior to commitment." Rory Riley, *A Punishment That Does Not Fit the Crime: The Use of Judge-Ordered Sterilization as A Condition of Probation*, 20 Quinnipiac Prob. L.J. 72, 83 (2006).

115 A community release program is "[a]ny program that allows inmates to work at paid employment or at a center work assignment, and to participate in education, training, substance abuse treatment programs, or any other transitional program to facilitate re-entry into the community while in a community release center." Fla. Admin. Code R. 33-601.602 (West 2023).

116 Restorative justice is "an approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved." *Restorative Justice in a Nutshell*, European Forum for Restorative Justice (July 29, 2024), <https://tinyurl.com/3a27ryby>. Restorative justice can be particularly useful in cases of sexual assault because it allows "victims to meet or communicate with their offender to explain the real impact of the crime" and to regain a sense of empowerment by giving them a voice. *Restorative Justice and Sexual Harm*, Restorative Justice Council (July 29, 2024), <https://tinyurl.com/yc2e6r4k>.

What Prosecutors Offices Can Do: Victim-Centered Approaches

- Prosecutors should avoid the application of preconceived and stereotyped notions of what constitutes gender-based violence against women and what women's responses to such violence should be.
- Prosecutors should advocate for rape standards based on consent and not force.
- Prosecutors should not insist on corroboration of victim's testimony before electing to prosecute the case.
- Prosecutors' offices should require police and prosecutors to take necessary training on trauma and how it affects rape victims.
- Prosecutors should follow a principle of "do no harm" in dealings with victims.
- Prosecutors should advocate for swift testing of rape kits and promote plans to help reduce the rape kit backlog in their jurisdiction.
- Prosecutors should work collaboratively with other professionals within the criminal system, including law enforcement, forensic examiners, crime lab analysts, dispatchers, corrections, probation, parole, and sex offender management professionals.
- Prosecutors should work collaboratively with other professionals outside of the criminal system, such as civil and victims' rights attorneys, faith-based providers, grant administrators, and policymakers.
- Prosecutors should establish specialized units to handle sexual assault and intimate violence cases.
- Rape cases should be prosecuted vertically, meaning the same prosecutor, who has specialized training and or experience in sensitive crime issues, handles the case from beginning to end.
- Prosecutors should meet with the victim prior to making a determination about whether or not to charge the offender.
- Meetings with victims should include a victim's advocate whenever possible.
 - An advocate can provide emotional support to the victim and encourage the victim to share details that are important to reviewing and potentially charging the case.
- Prosecutors should notify a victim of sexual assault of any decision not to charge the case.
 - The notification should occur promptly and if possible before the defendant is notified.
 - Notification should include an honest explanation of the reasons for the decision not to charge.
- Prosecutors should seek to understand the victim's emotional, cognitive and psychological limits.

- Prosecutors should inform victims about the potential for media in the case and rules regarding limitations on publicity regarding the victim.
- Victims who are unable (or unwilling) to participate in the prosecution of a case should be treated with the same dignity and respect as victims who are able and willing to fully participate.
- Prosecutors should prioritize the participation of victims in deciding the government's recommendations for potential outcomes.
- Prosecutors should explain the rationale for seeking a settlement and ask victims for their feedback when settlement options are being considered.

What Prosecutors Offices Can Do: Defendant-Centered Approaches

- Prosecutors should be aware of and utilize alternatives to incarceration for sexual offenses when warranted, including such alternatives as
 - Diversion.
 - Probation.
 - Community release.
 - Restorative justice programs.