

Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims

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I. INTRODUCTION

I begin this Article with a confession. In my thirty years of legal practice, I have never provided any civil legal services to a rape victim who was not also a victim of intimate partner violence. Although many of my clients have been sexually assaulted and physically abused, I have provided no services to the majority of these female rape victims. They are the women and girls who have been sexually assaulted by strangers or, more often, by acquaintances, friends, fellow students, and co-workers with whom they have never been in a substantial romantic relationship.¹ These rape victims are my invisible clients.

Although I am old enough to have been involved in legal services and clinical law teaching during its early and (some would say) more activist years, I never questioned why victims of stranger-rape, or rape by casual acquaintances, were not among our clients. Nor did I consider including these victims when I developed my own civil legal services programs for survivors of domestic violence. Like many attorneys specializing in domestic violence, I defined my clientele using the phrase “victims of domestic violence *and* sexual assault.” In practice, I never sought to provide services to victims of non-intimate partner rape.

True confessions aside, I am confident that I am not alone in this practice

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1. This article focuses on the absence of civil legal services for rape victims who are not also victims of domestic violence. Thus, unless otherwise noted, references to rape victims in this article exclude those many victims of domestic violence who are also sexually abused.

among the lawyers working within the larger civil legal services community.² As discussed in Part II of this Article, traditional legal services programs, law school clinics, and bar association pro bono projects have never served rape victims, particularly high school and college-age females who are most likely to be sexually assaulted. While many lawyers have worked tirelessly for these victims over the past thirty years, almost all work took place in the criminal justice system, on civil issues related to criminal justice, or on civil tort litigation. Yet the vast majority of rape victims never become involved in criminal or tort litigation, and they rarely have access to lawyers who can address their most pressing concerns, including: physical safety, educational and employment disruption, housing relocation, economic consequences and financial stability, immigration problems, and the need for medical, mental health, and disability services.

The absence of civil legal services for rape victims is reflected in the lack of discussion regarding their civil legal needs in legal literature. Among the thousands of articles that discuss rape, only a handful mention rape victims' need for legal counsel to address civil matters related to sexual assault. Although the substance of these needs and the legal tools necessary to address them are discussed elsewhere in this symposium issue,³ the noted absence of attention to these issues in legal writing at large is remarkable.⁴

Part III of this Article examines why the civil legal services community has failed to address the urgent needs of rape victims. The perception that sexual assault is a criminal and not civil matter is undoubtedly a significant factor in this failure, as is the fact that federally funded legal aid programs do not routinely initiate tort litigation. For many years, however, the civil legal services community has recognized the need to serve domestic violence victims, and thus additional factors may be operating to inhibit services delivery to victims of sexual assault. Part III explores the historical background of the legal system's response to rape, both how it is similar to and different from the historical response to family violence.

Examining a different history—the intersection of race and rape—also provides insight into the failure to serve rape victims. As will be discussed, false allegations of black men raping white women justified lynching well into the twentieth century.⁵ Moreover, until capital punishment for rape was abolished by the Supreme Court in 1977, racial discrimination in the execution

2. For purposes of this article, the “civil legal services community” refers to traditional legal aid programs, government funded legal services programs, law school clinics and externships, and pro bono (and the newer “low bono” or reduced fee) programs established to serve clients who cannot afford private legal representation.

3. See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Wave of Rape Reform*, 38 SUFFOLK U. L. REV. 465 (2005).

4. See *infra* Part II.C (verifying absence of legal resources addressing this issue with brief survey of rape crisis centers and state sexual assault coalitions).

5. See *infra* Part III.B.

of black defendants accused of raping white women (often referred to as “legal lynching”) was widespread.⁶ Civil legal services lawyers, who came of age during the civil rights movement of the 1960s, focused on issues of racial and economic discrimination, albeit in a civil context. In their professional interests and associations, however, legal aid lawyers were more closely aligned with criminal defense lawyers rather than police or prosecutors. In considering issues related to criminal justice, these lawyers were more likely to focus on the discriminatory treatment of minority defendants in the criminal justice system than on the legal needs of crime victims.

This discussion leads to a broader examination of how the philosophical underpinnings of the development (and subsequent restriction) of civil legal services operated against their serving victims of either domestic violence or sexual assault. Peter Margulies asserts that the dominant poverty law theorists of the past thirty years have viewed progressive lawyering through a lens that values the public over the private, thereby focusing their attention on governmental arbitrariness and abuse of power and dismissing gender issues, like violence against women, as private concerns. Simultaneously, poverty lawyers have valued an efficient “instrumental” lawyering style over an affective approach that entails time, self-disclosure, and attentiveness to interpersonal relationships.⁷ These dichotomies, he argues, operate to devalue individual service to victims of abuse, and have recently been challenged by domestic violence lawyers who place private, personal, and affective lawyering at the heart of their work.⁸ This analysis also supplies a rationale for the failure of civil legal services to serve rape victims.

Part III then analyzes current impediments that civil legal services organizations face in serving rape victims. These obstacles include the nature of sexual assault itself, the continuing dominance of criminal issues in modern rape reform, and the difficulty of changing internal organizational priorities and

6. Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 47 (1994) (noting overwhelming majority of men executed for rape were black males convicted of raping white women prior to Supreme Court’s abolishment of death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972)); see Carol S. Steiker, Book Review, *Remembering Race, Rape and Capital Punishment*, 83 VA. L. REV. 693, 699, 701 (reviewing ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE AND CAPITAL PUNISHMENT* (1995), and highlighting similar pattern of racial discrimination).

7. See Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071, 1072 (1995) [hereinafter Margulies, *Representation of Domestic Violence Survivors*] (setting forth thesis that dual dichotomies of public versus private concerns, and instrumental rather than affective lawyering styles impeded civil legal services from addressing violence against women); see also Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493, 495 (1996) [hereinafter Margulies, *Political Lawyering*] (further exploring dichotomies discussed in author’s earlier work). In his subsequent article, Margulies re-characterizes the instrumental/affective dichotomy as one of professional detachment over personal connection in the attorney/client relationship. Margulies, *Political Lawyering, supra*, at 506.

8. Margulies, *Political Lawyering, supra* note 7, at 496.

practices to accommodate an adequate legal services response to rape.

Part IV concludes this discussion by exploring how the recent availability of federal sexual assault funding provides an opportunity for the civil legal services community to improve its response to rape.⁹ Experience in expanding legal services to victims of domestic violence suggests, however, that funding alone is not enough; a number of other critical issues must also be addressed. First, even experienced lawyers must be educated in the realities of sexual assault and the inadequacies of the legal system in dealing with its victims. Second, civil lawyers must identify and obtain training and experience in areas of the law where they have not traditionally practiced. Third, these lawyers must develop and maintain effective collaborations with governmental and non-governmental sexual assault service providers in order to provide coordinated, multidisciplinary services that respond to the complexity of sexual assault. Finally, in order to effectively address the unmet needs of rape victims, local legal services offices must work to identify and involve the full array of existing civil legal service resources available in their community.

II. DOCUMENTING OUR FAILURE TO SERVE RAPE VICTIMS

A. *Where are the Lawyers?*

With the exception of the sexual assault initiatives recently funded by the Office of Violence Against Women (OVW), discussed in Part IV, I know of no publicly funded or non-profit civil legal services organization or traditional bar association pro bono program that has identified the civil legal needs of rape victims and given them priority for service. Among the many law school clinical and externship programs that I am familiar with, I know of only three that address the issue of sexual assault among non-intimate partners.¹⁰

9. The Office of Violence Against Women (OVW) in the Department of Justice has funded civil legal services for domestic violence victims for many years under a grant program now entitled Legal Assistance for Victims (LAV). Beginning in 2002, a portion of the funding within the LAV program was set aside specifically to support civil legal services to victims of sexual assault.

10. Two of these law schools focus primarily on victim representation within the context of criminal litigation, while the third is just beginning a commitment to provide civil legal services to rape victims outside the criminal context. Lewis and Clark Law School has been the most active in providing education and service in the area of sexual assault, albeit primarily in a criminal context. Their National Crime Victim Law Institute (NCVLI) is an innovative clinical program where students work on a wide array of issues concerning the protection and enforcement of victims' rights within the context of criminal litigation. *See generally* <http://www.lclark.edu/org/ncvli> (last visited Jan. 10, 2005). In association with the clinic is the National Alliance of Victims' Rights Attorneys (NAVRA), which is an alliance of lawyers currently involved in victim litigation, legislation and policy making. In 2003, the NCVLI expanded its services to include the Center for Law and Public Policy on Sexual Violence (CLPPS), which includes a focus on meeting civil legal needs.

The NCVLI is modeled after the Victims Legal Assistance Project (VLAP) out of Arizona State University. VLAP was created from a partnership between the ASU College of Law and the Arizona Voice for Crime Victims, Inc. and provides pro bono legal representation to victims of violent crime. Students involved conduct research and gather information to be used in criminal court proceedings across the country. For more

Although many rape crisis centers have identified and prioritized the civil legal needs of their clients—particularly in securing civil restraining orders—only a handful have been able to fund in-house lawyers to provide direct services to victims.¹¹

There are, of course, dedicated lawyers and non-lawyer advocates throughout the country who have worked for many years on behalf of rape victims. The overwhelming majority of these lawyers, however, are operating within the criminal justice system, or focused on protecting the privacy rights of rape victims in the criminal justice process. They are prosecutors and victim witness advocates in state and local law enforcement offices, as well as legislators, lobbyists, lawyers, and legal academics that advocate, often tirelessly, for reform in the law to hold perpetrators accountable in the criminal justice system and protect the privacy of rape victims.¹² More recently, there has been a national effort by civil lawyers to vindicate a wider range of victims' rights within criminal prosecutions, including the right to standing in the action, to notification of motions and hearings, and to participate more fully.¹³ Although many of these lawyers have identified and are working to address the range of civil legal needs of their clients, they only work with those involved in the criminal justice system, who constitute only a small minority of rape victims.¹⁴

information, see <http://www.law.asu.edu/Programs/ProBono/OrganizationsIndex.aspx> (last visited Jan. 10, 2005).

In the fall of 2002, the clinical program at Suffolk University Law School created a partnership with the VRLC, a non-profit legal organization devoted to serving non-domestic victims of rape. The Suffolk student clinics give priority to cases referred by VRLC and a senior clinician at Suffolk teaches a seminar on rape where students research VRLC legal issues. Suffolk students also intern at VRLC and, most recently, Suffolk and VRLC sponsored this symposium—the first of its kind dedicated to exploring the civil legal needs of sexual assault victims.

11. See *infra* Part II.C (discussing survey of rape crisis centers and sexual assault programs undertaken in connection with this article).

12. In the Boston area, pioneering work in both sexual assault and domestic violence was done in the 1980s by the Norfolk County District Attorney's Office. The Boston Police Department has recently had a very active sexual assault unit that coordinates its work with the Suffolk County District Attorney's Office. Wendy Murphy, a lawyer in private practice and currently teaching at New England School of Law, was a pioneer in representing rape crisis centers in privacy litigation and is nationally known for her work with victims of sexual assault in the criminal context.

13. The Office for Victims of Crime (OVC) in the federal Department of Justice and the NCVLI at Lewis & Clark Law School are working to establish nine legal clinics for victims (eight state offices and one federal office) in five geographic regions across the United States. Currently, the grant proposals are being reviewed by the OVC. Once grants are awarded, the legal clinics will work to expand the rights of victims within criminal proceedings, using VLAP in Arizona as a model. See Lee Gadinis, *With Expanded Scope and Staff, NCVLI Looks Forward to its Fourth Year*, NCVLI NEWS (Lewis & Clark Law School, Portland, Ore.), Fall/Winter 2003, at 1, available at <http://www.lclark.edu/org/ncvli/objects/Volume1.pdf> (last visited Feb. 8, 2005); see also *supra* note 9 (describing services provided by VLAP). See generally NCVLI Website, at <http://www.ncvli.org>. (last visited Feb. 8, 2005).

14. See CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 18-19 (1992) (offering statistics on rape). Rape is the least reported, indicted, and convicted felony in America. Of the small percentage of rape victims who report rape to law enforcement (an estimated 16-32%),

In addition, a growing number of tort lawyers have become engaged in representing victims of sexual assault. In some cases, they are successful not only in securing money damages for their clients, but also forcing far-reaching changes that can protect future victims from similar assaults.¹⁵ Most tort suits, however, are focused on securing money for individual victims, not other civil remedies. Furthermore, the tort litigation process is long and arduous. Since this litigation typically begins months or even years after the assault, these lawsuits rarely address the immediate civil legal needs of victims.¹⁶ Tort suits also require that there be wealthy defendants or, more typically, third-party defendants that can be held accountable for their negligence in preventing the sexual assault.¹⁷ Given that third-party liability will not be imposed lightly, strong facts are often necessary with respect to both the sexual assault and the defendant's responsibility for preventing it.¹⁸

only about 25% result in indictment and 12.5% in conviction. Thus, even among the few rapes reported to law enforcement, approximately 75% are never prosecuted, and only half of those prosecuted result in convictions. See NATIONAL CENTER FOR VICTIMS OF CRIME & CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992) (indicating 84% of rapes left unreported). Moreover, it has been estimated that among college students, the rate of reporting rape is substantially less than the rate among all victims. BONNIE S. FISHER ET AL., U.S. DEPARTMENT OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000) (estimating only 5% of college students report rape to authorities).

15. See *Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210, 1211 (E.D.N.Y. 1976) (awarding singer Connie Francis \$2.5 million in damages for inadequate security at hotel, which she alleged contributed to her rape). For a further discussion of tort and civil remedies for victims of rape, including the Connie Francis case, see William K. Jones, *Tort Triad: Slumbering Sentinels, Vicious Assailants, and Victims Viciously Vigilant*, 30 HOFSTRA L. REV. 253 (2001), and Steven C. Minson, *A Duty Not to Become a Victim: Assessing the Plaintiff's Fault in Negligent Security Actions*, 57 WASH. & LEE L. REV. 611 (2000). In a similar vein, about 500 clergy sex abuse victims filed lawsuits against the Boston Archdiocese and current or retired Catholic priests, many of which were recently settled. See Kathleen Burge, *Judge Rules Church Suits Can Proceed: Archdiocese's 1st Amendment Motion Rejected*, BOSTON GLOBE, Feb. 20, 2003, at A1; Matt Carroll, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A15; Denise Lavoie, *Mass. Court Dismisses Clergy Abuse Case*, ASSOCIATED PRESS ONLINE, Apr. 30, 2003, at 2003 WL 20005383. See generally Marjorie A. Shields, Annotation, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R.5th 1 (2004) (offering comprehensive discussion of tort liability against clergy members accused of sexual misconduct).

16. Interview with Jeffrey A. Newman, Greenberg Traurig, LLP, in Boston, Mass. (Mar. 29, 2004) (private practitioner representing hundreds of clergy sexual abuse victims in Boston); Interview with Lyn Schollett, Staff Attorney, Illinois Coalition of Sexual Assault (ICASA), in Springfield, Ill. (Apr. 2, 2004); Interview with Susan Vickers, Executive Director, Victim Rights Law Center, in Boston, Mass. (Mar. 25, 2004). See generally ILLINOIS COALITION AGAINST SEXUAL ASSAULT, A GUIDE TO CIVIL LAWSUITS: PRACTICAL CONSIDERATIONS FOR SURVIVORS OF CHILDHOOD SEXUAL ABUSE AND RAPE (2001) (providing useful advice to abuse victims in determining whether to seek civil tort remedy).

17. See Corinne Casarino, Note, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. PUB. INT. L.J. 185, 198 (1996) (observing "if the defendant is impoverished, it will be impossible to satisfy a monetary judgment against him"); Holly J. Manley, Comment, *Civil Compensation for the Victim of Rape*, 7 COOLEY L. REV. 193, 204 (1990) (noting assailant's financial status sometimes makes third party only viable source of compensation).

18. See generally Mark P. Buell, *Liability for Inadequate Security*, 69 FLA. B.J. 58 (1995) (discussing third-party liability in context of assault); Robert J. Homant & Daniel B. Kennedy, *Landholder Responsibility for Third-Party Crimes in Michigan: An Analysis of Underlying Legal Values*, 27 U. TOL. L. REV. 115 (1995);

In addition to tort litigation, there are federal statutes that provide the basis for a civil action. There was a brief window of opportunity to file civil suits against rapists based on the civil rights provisions of the Violence Against Women Act of 1994 (VAWA)¹⁹ and many women's rights lawyers took on these cases. Unfortunately, the Supreme Court declared this civil cause of action unconstitutional before any significant movement to file these civil actions was underway.²⁰ Currently, litigation based on federal entitlements can be brought under Title VII (against employers) and Title IX (against educational institutions), but these actions are limited to suits against the employer or the education institution, not the offending individual.²¹ Furthermore, these federal suits present the victim with all of the legal, social, and psychological impediments discussed above in connection with civil tort actions and, again, the victim's more immediate civil legal needs are rarely addressed.

Thus, while criminal justice professionals and tort lawyers clearly serve the needs of rape victims, their ability to address the unmet civil legal needs of sexual assault victims is extremely limited. Relatively few victims report rape to anyone, and even fewer disclose it to police and prosecutors or civil tort lawyers. For those victims who actually disclose rape, only a small number choose, or are given the opportunity, to have a criminal or tort action brought on their behalf.²² Finally, victims soon discover that being a victim/witness in a criminal or civil action against an alleged rapist or a third party increases, rather than resolves, the problems in their lives. As demonstrated so graphically in a series of highly publicized rape trials,²³ litigation—whether

Martin J. Rooney, *Liability of a Premises Owner for the Provision of Security: The Massachusetts Experience*, 29 SUFFOLK U. L. REV. 51 (1995). In an excellent discussion in support of exempting work-related rapes from the constraints of the workers' compensation system and permitting civil tort remedies, it has been stated that "[f]or rape to be treated as an exemption to the workers' compensation statutes demands a heavy burden of proof. In the case of rape, however, this burden can be met." Andrea Giampetro-Meyer et al., *Raped At Work: Just Another Slip, Twist, and Fall Case?*, 11 UCLA WOMEN'S L.J. 67, 87-88 (2000).

19. 42 U.S.C. § 13981 (1994).

20. See *United States v. Morrison*, 529 U.S. 598, 617 (2000).

21. 42 U.S.C. §§ 2000e to 2000e-17 (2000) (Title VII); 20 U.S.C. §§ 1681-1688 (2000) (Title IX); see also Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 MARQ. SPORTS L.J. 175, 177 (2003) (noting "Title IX is directed towards seeking redress against the recipient of federal funds, the educational institution, rather than remedying the officious actions of the individuals involved, whether it is the school employee or a fellow student"). See generally *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64, 76 (1992) (holding victim bringing action under Title IX may seek damages); *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1021 (7th Cir. 1997) (explaining Title IX applies to teacher's sexual harassment of student); Ann K. Wooster, Annotation, *Title VII Sex Discrimination in Employment—Supreme Court Cases*, 170 A.L.R. Fed. 219 (2004) (providing comprehensive discussion of Title VII cases).

22. See *supra* note 14 (setting forth statistics of reporting and prosecution of rape); see also William H.J. Hubbard, *Civil Settlement During Rape Prosecutions*, 66 U. CHI. L. REV. 1231, 1239-41 (1999).

23. The recent Kobe Bryant sexual assault case serves as an example. The media created a circus by highlighting every detail of the pre-trial court appearances, from the accuser's motives and past sexual history to Kobe Bryant's behavior and possible defenses. See, e.g., Steve Henson, *Bryant Accuser's Mother Pleads for*

criminal or civil—is an extended, emotionally draining experience that, more often than not, re-victimizes the rape survivor and increases her need for an array of legal services. Rarely, however, is a civil lawyer available to counsel a victim about the full range of her civil legal options, and the advantages and challenges of pursuing them.²⁴

B. Reviewing the Legal Literature

A review of the legal literature reflects the inattention of lawyers to the civil legal needs of rape victims. Whether reviewing the many articles on rape or the substantial literature devoted to civil legal services provision, one seldom finds any mention of the myriad of civil legal needs that arise in connection with sexual assault.²⁵ To whatever extent professional commentary mirrors lawyer activity or might create an impetus for lawyers to act, the absence of discussion on the unmet needs of rape victims is a dire prognostic sign.

1. Articles Discussing Rape

There is an increasing body of literature that *purports* to address the civil legal needs of victims of domestic violence and sexual assault, but the focus of these articles is always on domestic violence, and sexual assault rarely receives more than a cursory mention. In the rare instances where sexual assault is mentioned, it is rape in the context of an intimate partner relationship, rather than the more common context of acquaintance rape or rape by strangers.

Although the rape of non-intimate partners is a frequent topic in the legal literature,²⁶ the overwhelming majority of articles discuss issues related to rape as a crime. For example, in a review of the most recent articles, topics included the incidence of rape in particular contexts (marital rape, rape in connection with genocide, child and statutory rape), the elements of the crime (particularly force and *mens rea*), and the biology of rape, including some articles on the recent use of DNA evidence.²⁷ Of the books and articles most relevant to

Quicker Process: Letter to Judge Details Fears for Daughter's Safety and How the Case Disrupts Her Life, L.A. TIMES, Mar. 26, 2004, at A1; Tom Kenworthy, *Bryant's Accuser Testifies on Her Sex Life*, USA TODAY, Mar. 25, 2004, at A3; T.R. Reid, *Bryant's Accuser Seeks Court Date*, WASH. POST, Mar. 26, 2004, at A3. As William Hubbard writes, "[a] rape victim may desire justice, but ultimately she may accept an offer of payment in order to avoid the trauma of continuing investigation and possible trial." Hubbard, *supra* note 22, at 1233. The Kennedy-Smith rape trial in Florida represents another media circus revolving around the victim, her allegations, and past sexual behavior. See Gregory M. Matoesian, *Language, Law and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 678-96 (1995); Frank J. Priol, *Of Sex, a Senator and a Press Circus*, N.Y. TIMES, Apr. 6, 1991, at 7.

24. See generally Seidman & Vickers, *supra* note 3.

25. See *infra* Part II.B (summarizing research results). Students at Northeastern University School of Law undertook an extensive review of literature to locate articles discussing the civil legal needs of non-domestic violence victims of sexual assault, and Part II.B summarizes their findings.

26. A recent Westlaw search of the word "rape" in law-reviews produced over 10,000 citations.

27. See generally Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L.

victims, many concern what is typically the most significant issue in rape prosecutions: whether the victim consented to the sexual act and the legal and factual issues relevant to a defense of consent.²⁸ Related to this issue are the fairness of rape shield laws to defendants and the circumstances and procedures when victims' past sexual history can and should be admitted into evidence.²⁹ Finally, recent judicial decisions, particularly in my home state of Massachusetts, discuss broader intrusions into victims' privacy in the course of criminal litigation. These intrusions include subpoenas of victims' medical, psychiatric, and education records, *in camera* inspections of such records by judges, the entry of this information into evidence, and its use in the cross examination of the victim.³⁰

These are, of course, important issues for scholarly research and discussion. Yet this review of the literature does not reveal how few rape cases are ever disclosed to anyone, how few victims report sexual assaults to law enforcement, and how few cases are actually prosecuted—even with the cooperation of the victim. Articles on these topics, at least in the context of our current legal discourse about rape, are rarely written. This gap in the literature, however, is perhaps irrelevant, because reading what is published reveals a legal system so unsympathetic to rape victims that it provides more than enough reason for victims to avoid criminal prosecution.

Articles devoted to rape and civil legal issues are scant compared to those discussing criminal justice concerns. Not surprisingly, a growing area of civil litigation—recovery in tort for sexual assault—is being addressed.³¹ Although these civil actions focus on monetary compensation, they have the potential to address a host of related civil needs—including more effective internal disciplinary proceedings within institutions, civil protection orders, and

277 (2003); Ann T. Spence, *A Contract Reading of Rape: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57 (2003); Nicole Fusilli, Note, *New York State of Mind: Rape and Mens Rea*, 76 ST. JOHN'S L. REV. 603 (2003); Sarah M. Harless, Note, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L.J. 305 (2003); Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197 (2003); Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Case?*, 90 GEO. L.J. 1009 (2002).

28. See generally SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998); Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39 (1991); Casarino, *supra* note 17.

29. See Kevin D. Smith, *Navigating the Rape-Shield Maze: An Advocate's Guide to MRE 412*, ARMY LAW. Oct.-Nov. 2002, at 7-9; Casarino, *supra* note 17, at 188. Casarino notes that the "passage of so-called 'rape-shield laws' in most states appears to have had minimal effect on the incidence of reported acquaintance rapes." Casarino, *supra* note 17, at 188 (footnote omitted); see also ESTRICH, *supra* note 28, at 80.

30. See, e.g., *Commonwealth v. Pelosi*, 805 N.E.2d 1, 4-6 (Mass. 2004); *Commonwealth v. Oliveira*, 728 N.E.2d 320, 325 (Mass. 2000); *Commonwealth v. Herrick*, 655 N.E.2d 637, 639-40 (Mass. 1995); *Commonwealth v. Stockhammer*, 570 N.E.2d 992, 998 (Mass. 1991).

31. See generally William K. Jones, *Tort Triad: Slumbering Sentinels, Vicious Assailants, and Victims Viciously Vigilant*, 30 HOFSTRA L. REV. 253 (2001); Minson, *supra* note 15; Steinberg, *supra* note 28; Casarino, *supra* note 17; Manley, *supra* note 17.

victims' continuing need for medical and psychiatric care. Discussion of how to resolve these issues through tort litigation, however, is not the subject of the existing literature on civil remedies in tort. Nor is there any discussion of the difficulties in addressing related civil needs where the overwhelming majority of cases are settled without admission of liability and with complete confidentiality of settlement terms. Instead, the majority of articles discuss the same issues raised in the context of criminal litigation, and focus all too often on the credibility and conduct of the victim.³²

The legal literature also addresses the brief life of the civil rights action created by the VAWA.³³ This remedy is not currently available after it was successfully challenged,³⁴ and it will probably not re-emerge in federal legislation.³⁵ Legal literature's most extensive discussions of the VAWA civil remedy focus on its demise and the reasoning of the Supreme Court in declaring it unconstitutional.³⁶

Fortunately, there are a few articles that discuss the critical, but perhaps more mundane, civil legal needs of rape victims that lawyers might address.³⁷ Several of the most relevant articles assess the problem of sexual assault in the context of teen dating violence.³⁸ While these articles discuss teen dating violence as a subset of domestic violence, their emphasis on sexual assault differentiates them from the literature discussing domestic violence in general. These articles document how the legal system's response to domestic violence is focused on adult victims, even though adolescents constitute the largest single group of individuals victimized by acquaintance rape. These articles also recognize the inadequacy of the criminal justice system as a means to address the problem, and thus focus on alternate remedies including the need for civil legal assistance.

A more recent series of articles address the similar issue of how to deal with sexual assaults on college campuses. Two federally financed researched

32. See generally Steinberg, *supra* note 28; Casarino, *supra* note 17; Manley, *supra* note 17.

33. 42 U.S.C. § 13981 (1994).

34. United States v. Morrison, 529 U.S. 598, 617-19 (2000); see also Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIMONIAL LAW 173, 179-80 (1999) (discussing legal challenges to VAWA).

35. States may enact similar legislation without VAWA's constitutional constraints, and a few have proposed to do so. See H.R. 536, 93d Gen. Assem., Reg. Sess. (Ill. 2003) (proposing Illinois' Gender Violence Act as civil remedy for gender-related violence); Assem. 6636, 2003 Leg., 226th Sess. (N.Y. 2003) (allowing civil cause of action for gender-related violence).

36. See *Morrison*, 529 U.S. at 608-27 (discussing invalidity of federal civil remedy for victims of gender-motivated violence); see also Karp & Belleau, *supra* note 34, at 179-81; Casarino, *supra* note 17, at 191-92.

37. See generally Steinberg, *supra* note 28; Casarino, *supra* note 17; Manley, *supra* note 17.

38. See Roger J.R. Levesque, *Dating Violence, Adolescents, and the Law*, 4 VA. J. SOC. POL'Y & L. 339, 342 (1997); Carole A. Sousa, *Teen Dating Violence: The Hidden Epidemic*, 37 FAM. & CONCILIATION CTS. REV. 356, 370-71 (1999); Tiffany J. Zwicker, *Education and Policy Brief: The Imperative of Developing Teen Dating Violence Prevention and Intervention Programs in Secondary Schools*, 12 S. CAL. REV. L. & WOMEN'S STUD. 131, 138 (2002).

reports have documented the problem of sexual assault on college campuses and identified how institutions of higher education are responding to these assaults,³⁹ while a series of articles has explored using Title IX to control abusers and provide alternatives to criminal prosecution for college age women.⁴⁰

2. Legal Commentary about Civil Legal Services

A second branch of our search for legal literature involved the more generic topic of civil legal services. There is a considerable body of literature that addresses the functioning of civil legal services programs, the scope of clinical law school programming, and the important role of private pro bono efforts.⁴¹ These articles frequently focus on the unmet need for civil legal services and often include the results of recent surveys of low-income households to assess civil legal needs.⁴² They also frequently refer to the needs of particular populations, such as the elderly, the disabled, immigrants, and most recently, victims of domestic violence.

Significantly, two of the most relevant publications, the *Clearinghouse Review* (for legal services lawyers) and the *Clinical Law Journal* (for clinical teachers), make virtually no mention of rape. While these publications have, in recent years, paid considerable attention to issues involving domestic violence, they have ignored rapes occurring on the streets, on the job, on campus, and within high schools. Beyond cursory references to rape in the context of

39. In 2000, Bonnie Fisher, Francis Cullen, and Michael Turner released a research report based upon two national-level studies that were co-sponsored by the National Institute of Justice and the Bureau of Justice Statistics. See generally FISHER, *supra* note 14; U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY (1994). In 2002, a more extensive research report explored how colleges respond to sexual assault on campus, and highlighted the most promising policies and practices. See HEATHER M. KARJANE ET AL., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND (2002).

40. See Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 59 (1998) (discussing use of Title IX to hold colleges liable for athletes' sexual assault of women); Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 644 (2003) (proposing sexual harassment education for college football players to reduce schools' Title IX liability); Steinberg, *supra* note 28, at 51-56 (stating colleges violate Title IX by ignoring problem of campus rape).

41. See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 15 (2000); Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1972 (2003); Lonnie Powers, *Legal Needs Studies and Public Funding for Legal Services: One State's Partial Success*, 101 DICK. L. REV. 587, 587 (1997); see also David F. Chavkin, *Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 250 (2003); David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 210 (2003); Shauna I. Marshall, *Mission Impossible? Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 154 (2000).

42. See generally Leigh Anne G. Manlove, *More Than Lip Service: Making Equal Justice a Reality in the Practice of Law*, 27 WYO. LAW. 34 (2004); John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101 (2000); Powers, *supra* note 41; William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 40 LA. BAR. J. 477 (1993).

domestic violence, our search yielded no mention of the civil legal needs of rape victims.

Finally, the legal needs surveys designed to assess the adequacy of civil legal services also ignore the problem of sexual assault. For example, the Massachusetts Unmet Legal Needs Survey⁴³ is directed only at adult heads of household, not the high school or college age women most likely to be sexually assaulted. Moreover, the head of household is asked only one general question about “violence in the home” and one specific question of whether any *other adult* has been “physically, sexually or emotionally abused.”⁴⁴ The articles discussing the results of these surveys do not mention sexual violence.⁴⁵

C. Surveying Rape Crisis Centers and State Sexual Assault Coalitions

In a further effort to explore civil legal services resources available to rape victims, we emailed a simple inquiry to the staff at rape crisis centers and state sexual assault organizations nationwide.⁴⁶ The email described our interest in the provision of civil legal services to rape victims, which was explicitly defined to include securing civil restraining orders, providing assistance in housing, education, employment and health care matters, and civil representation of victims in criminal cases. The email briefly outlined the historic lack of such services in Boston, and asked respondents to describe the availability of civil legal services for their clients, and to identify any model service programs in their area.⁴⁷

43. MASS. LEGAL SERVS., MASSACHUSETTS LEGAL NEEDS SURVEY QUESTIONNAIRE, app. B (2000), at http://www.masslegalservices.org/docs/AppendixB_final.pdf.

44. MASS. LEGAL SERVS., *supra* note 43, app. B at 13. The two questions relating to household violence were: “Did any other adult living in the household suffer from physical, sexual or emotional abuse in the past 12 months?” and “Was there a problem with violence against anyone in your household in the past 12 months?” *Id.*

45. See generally LEGAL NEEDS STUDY ADVISORY COMM., POLICY IMPLICATIONS OF THE MASSACHUSETTS LEGAL NEEDS SURVEY (2003) (omitting sexual violence from discussion of comprehensive legal needs study), at http://www.masslegalservices.org/docs/Policy_Report_6.5.pdf; Powers, *supra* note 41 (same).

46. We decided to contact service organizations that we knew worked most closely with rape victims, rather than legal aid organizations, in order to explore the a viability of legal services from the victim’s perspective. This was intended as a very informal, anecdotal request, rather than as a formal survey.

47. In pertinent part, this email stated:

I am seeking information regarding the past and present availability of civil legal services for victims of sexual assault, either within your organization or made available to your clients from other community providers In the Boston area, such services were not historically available for victims of sexual assault, and even in recent years, there has been a far greater emphasis on serving DV [domestic violence] victims (For this information request, we are defining civil legal services to include civil restraining orders, housing, education, employment and access to health services issues as well as civil representation of victims in criminal cases, either to encourage or dissuade law enforcement and/or to protect their privacy rights in an on-going litigation).

Can you comment on the situation with respect to civil legal services for rape victims (who are not within the definition of a DV [domestic violence] victim) in your area over the years? Does it mirror the Boston experience, or has it been better or worse? Beyond generalities, is there any organization

The initial responses to this email arrived swiftly, and in greater numbers than anticipated.⁴⁸ Most respondents expressed interest in the topic and were enthusiastic about cooperating. Many of the emails made clear that individuals within their communities were concerned about the lack of civil legal services and working to remedy this problem. Frequently those who responded provided names and contact numbers of individuals who would welcome a call from us. It was also apparent that the respondents were circulating the email, and we continued to receive responses for many weeks.

In some respects, the results of this informal survey were unexpected. Many of the responses from people who work most closely with rape victims revealed a disquieting lack of awareness of the range of civil legal needs commonly faced by their clients. A surprising number of respondents assumed that the only civil legal service we were exploring was the availability of lawyers to file tort suits, although our email explicitly referenced a relatively extensive list of civil legal needs that did not include tort actions. Somewhat surprisingly, few responses mentioned civil representation of victims in criminal cases, legal action to protect the privacy of victims, or the confidentiality of rape crisis and other records, even though these issues were explicitly described in the email.

Many of the emails, however, were responsive to the inquiry, and the respondents repeatedly described local situations similar to Boston, where legal services programs focus only on victims of domestic violence, and largely on family law issues. These responses revealed that the legal services that were available had developed within the sexual assault services agencies themselves. Local rape crisis organizations typically provided legal services through non-lawyer advocates, and focused on protective orders and criminal court accompaniment, although other forms of assistance (in housing, health care, employment) were often provided by social services staff at their agencies. Many statewide coalitions employ lawyers, although most of these attorneys appear to focus on statewide issues such as training, legislative action, and advice to rape crisis centers on privacy and privilege issues, rather than individual representation. Increasingly, however, both the local and statewide programs—together with national organizations operating in this arena—are looking to the recent VAWA funding stream to finance civil legal services within their agencies.

This informal survey confirms that civil legal needs of rape victims are

in your area that has been providing civil legal services to rape victims for a significant length of time (i.e., before OVW began funding sexual assault within their Legal Services for Victims (LAV) program)? If not, what do you believe have been the major impediments ([m]oney? [l]ack of interest? [t]oo many competing priorities? [o]ther factors?).

Email from Lori Strickler, student, Northeastern Univ. Sch. of Law, to Rape Crisis Centers nationwide (Jan. 22, 2004) (on file with author).

48. We received over forty responses in the first three weeks after sending the email. The responses were from all areas of the country, and from both local and statewide programs.

neither understood nor widely available, even among staff who work with victims of sexual assault, and that traditional legal providers—including publicly funded legal services, clinical law programs, and pro bono projects—are not mobilized to do this work.⁴⁹ Yet to mobilize the larger civil legal services community, it is important to understand why it has failed to serve victims of sexual assault in the past and what barriers it must overcome to serve them in the future.

III. EXPLORING OUR FAILURE TO SERVE RAPE VICTIMS

Beyond the perception that sexual assault is largely a criminal matter, the history of civil legal responses to violence against women, as well as the historical development of civil legal services, helps to explain our failure to address the civil legal needs of victims of sexual assault. This history also helps to explain why in recent years it has been easier for the law, and civil lawyers, to focus on the civil legal needs of victims of domestic violence, including those sexually assaulted by their partners, instead of the majority of rape victims comprised of younger women assaulted by friends, acquaintances, fellow students, and co-workers.

A. Addressing Violence Against Women: An Historical Perspective

Many individuals working in abuse prevention today would estimate that interest in violence against women began during the women's liberation movement of the late 1960s and early 1970s.⁵⁰ Indeed, the modern anti-rape movement did arise during this period, and in fact it both preceded and supported later activism on behalf of victims of domestic violence.⁵¹ Recent legal reforms with respect to domestic violence, however, have been far more significant, and have had a far more substantial impact on women than that of rape law reform during this same period. In many respects, the greater impact of recent efforts address domestic violence reflects historical differences between the family violence movement and anti-rape movement prior to this modern era of law reform. This disparate history, both before and after the activism that began in the 1960s, is an important factor that influences our current failure to provide civil legal services to rape victims.

Linda Gordon's groundbreaking book, *Heroes in their Own Lives: The*

49. Absent such a mobilization, it appears that sexual assault service organizations are prepared to secure their own funding and hire their own lawyers. Limiting the development of civil legal services for rape victims to small "in house" legal programs within sexual assault organizations, however, will not tap into the range of expertise, experience, and ultimately the greater resources of the larger legal services community.

50. See ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 3-13 (1987); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 29-68 (1982).

51. See generally SCHECHTER, *supra* note 50.

Politics and History of Family Violence, chronicles the history of family violence.⁵² As the author recounts, the first attempt to stop or at least control family violence began in the 1870s, when agencies concerned about child abuse were drawn into other forms of family violence.⁵³ Although Gordon credits earlier waves of the women's rights movements as influential in drawing attention to domestic violence, anti-feminism often dominated the institutional response, and those opposed to family violence were still focused on preserving the ideal of the traditional family, including the dominance of the male head of households.⁵⁴

Given this emphasis on the continuing stability of the male-dominated family, it is not surprising that the sexual assault of children, adolescents, and adult women was ill-addressed by these early reformers, although it cannot be said that the problem was not recognized. As Judith Herman recounts, eminent psychiatrists working in the late 1800s came to realize that many of their female patients had suffered deep psychological trauma at an early age, which Freud attributed to premature sexual experience.⁵⁵ The implication of his work, that the rape of children—particularly young girls—was common among all social classes, however, was not acceptable in the repressive, male-dominated culture of the era, and Freud himself quickly recanted in the face of widespread criticism.⁵⁶

Similarly, when the child protection workers of the late nineteenth and early twentieth centuries confronted the problem of child sexual abuse in families, they initially acknowledged that incest cases were all too common and that they were quintessentially male crimes against girls. In an effort to draw scrutiny away from patriarchal family relationships, they quickly redefined the problem as one attributable to the “sex delinquency” of the victim.⁵⁷ Attention was drawn to girls who were raped “on the streets” or others who were prostituting themselves, but rather than focus on their earlier experience of child molestation, their victimization was often viewed as a direct result of their

52. See generally LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988) (chronicling social policies and implications of child abuse and neglect, wife-beating, and incest from 1880 to 1960).

53. GORDON, *supra* note 52, at 252.

54. GORDON, *supra* note 52, at 4, 57.

55. JUDITH HERMAN, M.D., *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 12 (1992). Freud was one of several well-known men of science, including Pierre Janet as well as Freud's collaborator Joseph Breuer, who recognized that hysteria had its origins in early psychological trauma. *Id.* at 12. From his work with female patients, Freud became convinced that early sexual assault—from fathers, family members, and friends—was the primary trauma leading to hysteria, and he published an article on the subject, entitled the *Aetiology of Hysteria*. *Id.*; see also GORDON, *supra* note 52, at 215-18.

56. HERMAN, *supra* note 55, at 18 (describing how, when Freud's peers ridiculed his ideas, Freud changed his and described reports of abuse as fantasies to explore but not to believe).

57. GORDON, *supra* note 52, at 219.

irresponsible presence in public or unrespectable places.⁵⁸ Blaming these victims reached new heights when social welfare workers began to focus on the “feble-mindedness” of victims.⁵⁹ The law, when evoked at all, sought to incarcerate victims as criminals or as insane.⁶⁰ Thus defined, there really were no rape victims about which society should be concerned. As summarized by Linda Gordon:

Girls who stayed away from home, came home late, used vulgar language, rode in cars, drank or smoked, walked or dressed “immodestly,” were liable to be declared delinquent and thereby deprived of sympathy if they were sexually victimized. A medical expert in sex abuse cases insisted that “we seldom find cases of rape in healthy, robust girls in possession of their faculties and who are above the age of fourteen”—those who were healthy were presumed to be willing.⁶¹

This historical perspective, although formally repudiated by current anti-rape laws, is still present in our culture and still reflected in legal decision-making. Although many changes in the law have occurred in the modern history of rape law reform, the focus remains on the victim and her behavior, and her sexuality is a weapon to be used against her.⁶² Defendants routinely seek to override rape shield laws, argue against privileges protecting private records of the victim, and relentlessly attack the reputation, credibility, and motives of the victim—usually in pursuing their defense of consent.⁶³ Similar to those adolescent “sex delinquents” of earlier times, today’s sexually active teenager is more vulnerable both to sexual assault itself and to allegations that she was a willing participant.

58. GORDON, *supra* note 52, at 215, 220.

59. GORDON, *supra* note 52, at 220 (discussing shift from victim of child molestation to sex delinquent to feeble-minded); see HERMAN, *supra* note 55, at 115 (describing psychological condition of chronically abused people). It is consistent with our modern understanding of trauma that victims of repeated sexual assault may appear to be feble-minded. In her book, Judith Herman describes the chronically abused person’s “apparent helplessness and passivity, her entrapment in the past, her intractable depression and somatic complaints, and her smoldering anger.” HERMAN, *supra* note 55, at 115. Herman reports how other psychologists have described women with histories of sexual abuse as having consistently higher measures of “somatization, depression, general anxiety, phobic anxiety, interpersonal sensitivity, paranoia, and . . . dissociative symptoms,” and as “displaying more insomnia, sexual dysfunction dissociation, anger, suicidality, self-mutilation, drug addiction and alcoholism” than other women. *Id.* at 122-23.

60. GORDON, *supra* note 52, at 220-21; see also Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 65-94 (1978).

61. GORDON, *supra* note 52, at 221.

62. See generally SCHULHOFER, *supra* note 28 (offering comprehensive discussion of rape law history).

63. Casarino, *supra* note 17, at 199 (noting “[t]he most common defense in acquaintance rape cases is that the victim consented”); see also Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72, 75 (2001); Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 881-82 (2002); Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 512-14 (1999).

The contrast in the modern legal system's response to victims of domestic violence and victims of sexual assault over the past thirty years is striking. Although this discussion will focus on civil legal remedies, it is important to note that police and prosecutors have yet to treat victims of sexual assault—particularly young women raped by acquaintances—as seriously as they have recently begun to treat victims of family violence.⁶⁴ Moreover, most victims of domestic violence are not as vulnerable to the demeaning personal attacks and court-sanctioned invasions of privacy that rape victims experience.⁶⁵ Aggressive discovery into the victim's personal life often focuses on the victim's sexual activities or counseling she has received and is frequently used to humiliate victims and dissuade them from cooperating with the prosecution. The fact that the defendant is typically a stranger or mere acquaintance makes legally sanctioned discovery proceedings all the more intrusive and frightening. The fact that victims rarely have standing in criminal proceedings to vindicate their own rights is both a further disempowerment and a legal injustice.⁶⁶

Developments in the civil law—both statutory and judicial—are far more protective of domestic violence victims than of the majority of victims of sexual assault. For example, the development and enforcement of restraining orders has arisen as a significant civil legal protection in the modern era of domestic violence prevention.⁶⁷ In most jurisdictions, however, these civil restraining orders are only available to individuals in marriage, intimate partnerships, family or substantial dating relationships, and thus these statutes rarely cover the majority of sexual assault victims who are raped by acquaintances with whom they do not have a pre-existing romantic relationship

64. See Zwicker, *supra* note 38, at 131 (observing “[a]pproximately one in every five female high school students has been physically and/or sexually abused by a dating partner”); see also Sousa, *supra* note 38, at 363 (noting teen abuse victims often go unnoticed).

65. For example, while defendants in domestic violence cases may attack the veracity of victims in a criminal or civil proceeding, they generally do not imply that the victim consented to threats of violence or physical attack. Nor does the law require these victims to demonstrate a lack of consent by fighting back. In contrast to rape trials, defendants in domestic violence cases make fewer efforts to secure private and privileged information, in part because perpetrators are likely to know a great deal about their victims already. Moreover, when such requests are made by partners or family members, they are less threatening because domestic violence victims are likely to share an intimate history with the perpetrator, unlike victims whose perpetrator is a mere acquaintance or a stranger.

66. Michelle Lawson, Seminar on Sexual Violence 3 (2004) (unpublished student research essay, Suffolk University Law School) (on file with Professor Ilene Seidman at Suffolk University Law School) (explaining only four states currently provide full legal standing to victims). See generally Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U. L. REV. 291 (2005).

67. See EVA S. BUZAWA ET AL., DO ARRESTS AND RESTRAINING ORDERS WORK? 222 (1996); John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 220-21 (2003); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1170 n.91 (1995); Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy,”* 11 S. COL. INTERDISC. L.J. 361, 364-68 (2002).

or by strangers.⁶⁸ Similarly, many jurisdictions, including Massachusetts, do not have readily available restraining orders to prevent stalking, a common problem in sexual assault cases. If there has already been an actual or threatened physical or sexual assault, a domestic violence civil restraining order can prevent stalking, but again the victim and perpetrator must have a pre-existing relationship that provides jurisdiction under these statutes.⁶⁹

Another area of domestic violence reform has focused on family law issues, primarily in child custody, visitation, and support. After years of inattention, lawyers, legislators, and family court judges are slowly developing laws and procedures to better protect children and battered mothers upon separation from the perpetrator.⁷⁰ These developments include presumptions that joint custody is inappropriate in cases of domestic violence and that visitation should be limited to protect the abused parent.⁷¹ Although these family court reforms may not be relevant to the majority of youthful sexual assault victims do not share children with their assailant, the strong family law preference for including even abusive fathers in the lives of their children does create a very serious problem for mothers whose child was conceived as a result of rape. In these situations, a mother's desire to avoid a paternity adjudication or terminate the rights of the rapist clearly requires sophisticated legal advocacy.⁷²

In two other child-related areas where a victim who becomes pregnant with the rapist's child might need services, protective laws championed by liberal activists have been under relentless attack in recent years. Rape victims who bear a child as a result of their assault are, like other mothers, increasingly cut off from public income benefits that may be essential to raising their child.⁷³

68. See generally Helen Gerostathos et al., Multi-State Survey of Civil Restraining Orders (2003) (unpublished research on file with Sue Finegan, Legal Director of the Victim Rights Law Center).

69. Northeastern University School of Law: Law, Culture and Difference Law Office #15, Analysis of Stalking Statutes (2004) (unpublished student research paper) (on file with author).

70. See *In re Vaughn*, 664 N.E.2d 434, 439-40 (Mass. 1996) (holding domestic violence issues requires consideration in awarding custody). As a result of *Vaughn*, the Massachusetts legislature amended its statute regarding joint custody to include a rebuttable presumption regarding the best interests of the child in custody cases. See MASS. GEN. LAWS ch. 208, § 31A (2004). The relevant statutory language states:

A Probate and Family Court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent.

Id.

71. *Vaughn*, 664 N.E.2d at 439-40; *Mallouf v. Saliba*, 766 N.E.2d 552, 554-55 (Mass. App. Ct. 2002).

72. Lisae Jordan at the Sexual Assault Legal Institute in Maryland has handled several of these cases, which fall well within the traditional expertise of family law attorneys at legal services offices.

73. Entitlement to federal welfare benefits ended with the reorganization of the welfare system mandated by the passage of the Personal Responsibility and Work Opportunity and Reconciliation Act of 1996 (PRWORA). Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in multiple sections of United States Code chapter forty-two). The PRWORA compelled states to reduce their welfare roles by moving people from welfare to work; it replaced the federal entitlement program Aid to Families with Dependent Children (AFDC) with a block grant structure, Temporary Assistance for Needy Families (TANF); it placed a five year lifetime limit on benefits (or less at the option of the states who have now enacted twenty-four

Unlike other mothers, however, governmental efforts to hold fathers accountable for child support payments are seldom seen as an option for victims who want no contact with their rapists.⁷⁴ Similarly, the alternate option to terminate an unwanted—and more often than not a psychologically damaging—pregnancy is also threatened, particularly in the current Bush administration.⁷⁵

In an era where reforms in our criminal and civil legal system increasingly address the needs of victims of family violence, it is unfortunate that victims of sexual assault have not benefited from similar reforms. From a historical perspective, it may appear that this problem will resolve with time; as reforms are institutionalized for one class of victims of violence, the needs of other similarly situated victims will then be addressed. Since civil legal services programs were slow to begin serving victims of domestic violence,⁷⁶ their current inattention to the needs of rape victims may change as anti-rape legal activists set a new precedent of aggressive representation. As discussed below, however, there are other factors that underlie the apparent reluctance of civil legal services programs to embrace the provision of services to women victimized by violence, and particularly male sexual violence.⁷⁷

consecutive month limitations); and it greatly increased states' discretion to create and administer their own welfare programs. See Erin Holland, Note, *From Welfare to Work: What the 1996 Welfare Reform Initiative Has Meant for Children*, 11 GEO. J. ON POVERTY LAW & POL'Y 115, 115 (2004). Unfortunately, while the emphasis on female head of household reliance on work rather than government benefits might produce long-term benefits to mothers and their children, their interim need for education, job training and, perhaps most significantly, quality child care is not being met by the current efforts of the now discretionary state programs. *Id.* (discussing these factors with emphasis on negative consequences of failure to provide child care). Although victims of rape may well qualify for waivers, or even exemptions, to certain punitive provisions of state TANF programs, in our work with victims we have found relatively few who have been apprised of their rights to apply for such waivers or exemptions.

74. Rape victims who do not receive welfare benefits would not seek child support in these cases, while victims who receive state TANF benefits should apply for a waiver of cooperation with child support enforcement.

75. The extent that the current Bush administration is pursuing administrative, legislative, and judicial means to limit women's access to abortion—both nationally and around the globe—has been documented in a recent article. See generally Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752 (2004). Although even strong opponents of abortion have traditionally made exceptions for women willing to document that their pregnancy results from rape or incest, recent "back door" attempts to limit the scope of *Roe v. Wade* have included attempts to place intolerable reporting burdens on poor rape and incest victims who seek federal Medicaid funding for abortions. See generally Sandra Berenknopf, Comment, *Judicial and Congressional Back Door Methods that Limit the Effect of Roe v. Wade: There is No Choice if There is No Access*, 70 TEMPLE L. REV. 653 (1997). Moreover, even if rape and incest are technically excluded in the move to restrict abortion, we can expect that if the Bush administration is successful in limiting access to abortion for the majority of women, this will have a significant impact on the availability of medical providers who will be willing to perform the procedure for victims who are willing to assert that they are rape or incest victims and thus "qualify" for the procedure.

76. Margulies, *Representation of Domestic Violence Survivors*, *supra* note 7, at 1075.

77. *Infra* Part III.B-D.

B. Race and Rape: A Separate Historical Perspective

The complex intersection of race and rape may be implicated in the failure of progressive legal services lawyers to prioritize the needs of sexual assault victims. From slavery through reconstruction, rape was a direct and legally sanctioned tool of oppression against black women.⁷⁸ Black men, however, were also early targets of sexualized violence—falsely accused of raping white women and sexually abused before they were murdered.⁷⁹ Lynching, often based on false allegations against black men for raping white women, remained a particularly sexualized form of oppression for many decades, and as late as the 1960s, civil rights lawyers were addressing the problem.⁸⁰ This connection of race and rape often lead white women to focus not on their own actual sexual oppression, but on the perceived sexual threat of black men.⁸¹ This perceived threat also served to create within black women a profound distrust of the legal system and reluctance to acknowledge the violence in their relationships with black men.⁸²

As discussed by Alisa Bierria, the modern anti-rape movement that began in the 1970s “included a critique of male domination as if it were the only dynamic of oppression that needed to be undermined in order to eliminate rape.”⁸³ Women of color and immigrant women had marginal involvement in the anti-rape reform movement begun in the 1970s, and their particular needs and interests were the last priority. To some extent, this is directly related to primacy of the women’s liberation movement in the fight to end violence

78. See generally BEVERLY BALOS & MARY LOUIS FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (1994); ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS (1981); BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75 (1987); Gail Elizabeth Wyatt, *The Sociocultural Context of African-American and White American Women’s Rape*, 48 J. SOC. ISSUES 77 (1992); Alisa Bierria, *An Historical Perspective on Anti-Rape Organizing*, Communities Against Rape and Abuse, at http://www.cara-seattle.org/w_historical.html (Spring 2003).

79. See Bierria, *supra* note 78. Bierria writes that “[w]hen Black men were lynched, the lynchers would often torture them before hanging them, cutting off sexual parts of their anatomy in particular.” *Id.*; see also *McQuirter v. State*, 63 So. 2d 388, 390 (Ala. Ct. App. 1953) (reflecting a more modern perspective). In *McQuirter*, the Alabama Court of Appeals upheld the conviction of an “attempt to commit an assault with the intent to rape” against the defendant, an African American man, who was walking down the same side of the street as the white female “victim” and her children. 63 So. 2d at 389-90.

80. ARTHUR F. RAPER, THE TRAGEDY OF LYNCHING 141-48, 150-53 (1969); see Bierria, *supra* note 78 (noting “[w]hen black women were lynched, they were often raped first”); see also HOOKS, *supra* note 78, at 53-62.

81. See Bierria, *supra* note 78; see also HOOKS, *supra* note 78, at 53-62 (explaining white women fear and avoid black men as result of brainwashing by white supremacists).

82. Bumiller, *supra* note 78, at 87; Wyatt, *supra* note 78, at 86-88. Bumiller explains that:

The tensions about rape within the contemporary black community have created a situation in which men and women fear the potential for the singling out of black men as perpetrators in the rape of white women, and black women, affected by the extraneous forces on their community, are likely to be discouraged from reporting intragroup rape.

Bumiller, *supra* note 78, at 87.

83. Bierria, *supra* note 78.

against women and its early focus on gender oppression, rather than the impacts of race, class, or other forms of oppression.⁸⁴ Black women viewed this anti-rape focus on male oppression as a further attack on black men.⁸⁵

Black women, however, were not the only group who are conflicted over the intersection of race and rape. Progressive lawyers, whose commitment to social justice was often forged in the civil rights movement of the 1960s, have long focused on discrimination based on race and class. As a result, civil legal services lawyers, like their criminal law counterparts, tend to champion minority defendants against the racial discrimination of the criminal system and do not advocate for victims of crime.⁸⁶ Unfortunately, constructive discussion of the intersection of racial discrimination and violence against women is far too rare. In our legal practice, we have consistently found that progressive lawyers concerned about how racism affects minority men in the criminal justice system are rarely sympathetic to the plight of victims. Similarly, many of those championing the rights of female victims of violence prefer not to focus on the discriminatory impacts of anti-violence efforts on men of color.⁸⁷ Thus, the apparently conflicting dynamics of race and feminist anti-violence efforts remain largely unaddressed. The challenge for both the anti-rape and anti-racist movements is to address this conflict. Alisa Bierria provides a starting place when she concludes:

In truth, specific oppressions (male domination, white supremacy, class exploitation, etc.) rarely work singularly. Instead, oppressions feed off of each other, their dynamics changing according to specific contexts. The current challenge for anti-rape organizers is to develop solid analyses of rape and rape culture that recognize the multiplicity of oppressions that constantly shape and influence each other The time for thinking about rape as merely a tool of male domination is over. We must be able to mindfully articulate spaces where anti-rape organizing is inseparably linked to organizing against police brutality, for labor rights, and for immigration rights.⁸⁸

84. Bierria, *supra* note 78.

85. See *supra* note 82 and accompanying text (discussing tensions over rape within black community).

86. Civil legal services lawyers have long been joined with indigent criminal defenders in their primary professional association, the National Legal Aid and Defender Society. Many progressive lawyers see law enforcement's current focus on violence against women as inevitably having a discriminatory and disproportionate impact on indigent defendants, often poor minority men. While these lawyers are certainly not in favor of violence against women, they view aggressive legal advocacy on behalf of victims with ambivalence.

87. Bumiller, *supra* note 78, at 88 (noting conflicting interests between those who represent minority men and those who represent female victims). As Bumiller explains in her discussion of rape and race, "[L]eaders of the feminist and antiracist social movements in contemporary America have, for the most part, steadfastly avoided open examination of their interests." *Id.* See generally Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER L.J. 43 (1992) (offering extended discussion of rape and race).

88. Bierria, *supra* note 78.

C. Historical Constraints on Civil Legal Service Providers

The preceding discussion of rape and race provides just one example of how the history of the civil legal services movement may help to explain why legal services programs have not focused on the civil legal needs of rape victims. Other factors—both practical (the steady erosion of governmental financial support), ideological (the focus on the power of the state), and economic (the preference for efficient instrumental as opposed to time-consuming affective legal representation)—have also inhibited these programs from focusing on violence against women. This Article will briefly discuss these issues below.

Throughout the past century, attorneys in private practice, at law schools, and supported by non-profit corporations, have addressed unmet civil legal needs of our most disadvantaged and vulnerable individuals.⁸⁹ Yet, it was not until the civil rights upheaval of the 1960s that substantial public funding of civil legal services began, and the Legal Services Corporation (LSC) was established.⁹⁰ Supported by the increasingly progressive students and faculty of prominent national law schools, and by substantial funding from the Ford Foundation, federally funded legal aid lawyers soon migrated to the halls of academia to create a host of clinical legal programs.⁹¹ By the beginning of the 1970s, these lawyers had established a new and vibrant legal specialty: poverty law.⁹²

Unfortunately, these programs did not escape the retrenchment of

89. See Luban, *supra* note 41, at 210; Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 328-29 (2001). Many of the early services for disadvantaged individuals were provided from traditional charitable perspectives, while the latter half of the century saw a rise in professional activism by lawyers who sought to promote what many considered to be radical social change. See Wizner, *supra*, at 328-29; see also Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 369-70 (1994) (discussing insufficient staff to meet legal needs of poor). Eldred and Schoenherr explain that:

By 1960, two hundred legal aid offices operated with a staff of 132 full-time attorneys. Unfortunately, these charitable contributions were insufficient to meet the legal needs of the poor, as less than 1 percent of the Nation's 39 million poor people in 1960 received legal assistance from legal aid societies.

Eldred & Schoenherr, *supra*, at 369-70 (footnotes omitted).

90. Marshall, *supra* note 41, at 154-55 (outlining history of LSC). The federal Office of Economic Opportunity's funding of non-profit legal aid programs led to the development of LSC, a federally funded yet independent non-profit organization designed to support the continuing funding of local legal services programs. *Id.*

91. Wizner, *supra* note 89, at 331-33 (describing early years of clinical education programs). The founders of the clinical law movement sought to engage students in the provision of civil legal services as a part of their academic training. *Id.* at 332. Professor Wisner explains that it is "not surprising that the first generation of clinical teachers came from the world of legal services, civil rights, and public interest practice. They were social activist lawyers who had eschewed careers in private practice in order to work for social and economic justice." *Id.*

92. Attorneys in private practice have also contributed to the poverty law movement, both through the steadfast support that local and national bar associations have given to LSC and other local non-profit legal services programs, and through the development of private pro bono programs. See Marshall, *supra* note 41, at 147-48, 208 (describing lawyers as public citizens with corresponding duties).

progressive ideals, politics, and funding that has occurred over the past thirty years. Although President Reagan did not achieve his goal of eliminating LSC, conservative political animus over the activism of LSC funded lawyers has led to consistent reductions in funding at each reauthorization,⁹³ and escalating limitations on the types of cases that LSC funded attorneys could pursue.⁹⁴ Meanwhile, clinical law programs have become increasingly centered on skills training rather than social change,⁹⁵ and pro bono efforts have failed to live up to their promise.⁹⁶ As a result, the unmet demand for civil legal services increases every year. This is hardly an encouraging environment in which to argue that a new category of clients—victims of sexual assault—deserves priority in service.

The diminishing capacity of legal services to address all issues, however, does not adequately explain why poverty law has never attempted to serve rape victims. Even at its strongest, the history of the poverty law movement reveals little interest in serving the needs of female victims of violence.⁹⁷ Peter Margulies presented an excellent analysis of this historical inattention to violence against women in an article published in 1995.⁹⁸ Margulies argues that civil legal services lawyers did not address violence between poor men and women because they were focused on addressing the injustices perpetrated by public actors (governments and powerful institutions) against what was considered a unified class of poor people.⁹⁹ Margulies also argues that legal

93. Eldred & Schoenherr, *supra* note 89, at 370. Eldred & Schoenherr note that “LSC had fallen out of favor with the Reagan administration, which drastically slashed the corporation’s budget to \$241 million in 1982, and appointed directors who were hostile to LSC’s very existence.” *Id.*

94. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1792 (2001). “Legal Aid programs that accept federal funds may not accept entire categories of cases or clients who seldom have anywhere else to go, such as prisoners, undocumented immigrants, or individuals with claims involving abortions, homosexual rights, or challenges to welfare legislation.” *Id.* The single most crippling action against LSC restricted its programs from using their non-federal funds those activities that were prohibited using federal money. *See* Lubin, *supra* note 41, at 221-22. Fortunately, there has been a resourceful counter-movement to create activist legal services programs that do not seek or rely on federal funding, but are set up as separate organizations that work with LSC funded counterparts. *See id.* at 222.

95. Wizner, *supra* note 89, at 332-33. The maturation of the clinical law movement has not lived up to its earlier promise of transforming legal education and increasing the ranks of graduates who choose public interest careers. As the clinical programs have become more integrated into the academic life of the law school, they have also become more focused on skills training and general legal practice, and, arguably, less focused on “real world” social justice concerns. *Id.*

96. Rhode, *supra* note 94, at 1808, 1810 (describing pro bono work as rhetoric). Rhode notes that “[a]ccess to justice is a favorite theme in bar rhetoric but a low priority in reform agendas.” *Id.* at 1808. “Pro bono programs involving the profession’s most affluent members reflect a particularly dispiriting distance between the bar’s idealized image and actual practices.” *Id.* at 1810.

97. Margulies, *Representation of Domestic Violence Survivors*, *supra* note 7, at 1088 (observing absence of female abuse victims from poverty law movement).

98. *See generally* Margulies, *Representation of Domestic Violence Survivors*, *supra* note 7.

99. Margulies, *Representation of Domestic Violence Survivors*, *supra* note 7, at 1081-84 (noting public issues surrounding poverty receive attention yet private issues rarely receive attention). Margulies argues that the focus both on public action and the representation of poor people as a unified class created a public/private dichotomy that “ignored gender issues as *private* concerns.” *Id.* at 1071. This effectively prevented lawyers

services' focus on instrumental rather than affective lawyering styles, or, stated somewhat differently, a dichotomy between the professional verses personal approach in client representation, also operated against prioritizing cases involving violence against women.¹⁰⁰ As a result, lawyering for female victims of interpersonal violence continued to be disfavored not only because the issue was a private and not public matter, but because these cases could not be handled efficiently and with professional detachment.

From this perspective, it is understandable that the civil legal services community was not an early leader in the movement to end violence against women. As our societal attitudes toward domestic violence began to change, however, so too did the work of legal services lawyers. Led by early activists and funded to focus on this work, civil legal services programs began to prioritize the needs of domestic violence victims. It is now time to apply a similar focus to non-domestic victims of rape.

D. Current Impediments to Serving Victims of Sexual Assault

Independent of the history of civil legal services—with its political vulnerability to funding reductions, and its restrictions and historic dichotomies of theory and practice—there are other factors that impede civil legal services programs from giving rape victims priority for service. These factors include the realities of rape and its crippling impact on victims, the myth of criminal justice remedies, and the screening out of most rape victims by seemingly neutral eligibility requirements. As a result, most experienced legal services lawyers are ignorant of the multiplicity and urgency of civil legal needs created by sexual assault, and the often-tragic repercussions to the victim if these needs are not met.

1. The Realities of Rape and its Impact on Victim Help-Seeking

An attorney friend of mine recently stated the obvious: the most common reason rape victims do not receive civil legal services is that they do not disclose their sexual assault.¹⁰¹ We know from our experience in providing

from addressing unjust and oppressive private relationships among these individuals, including, most specifically, violence against women. *Id.* at 1077-78; see also Margulies, *Political Lawyering*, *supra* note 7, at 498-50.

100. Margulies defines “instrumental” in this context as the efficient shaping of legal services to maximize success in as many cases as possible, while an affective lawyering style entails time, self-disclosure and attentiveness to interpersonal relations. Margulies, *Representation of Domestic Violence Survivors*, *supra* note 7, at 1073. In a subsequent article, Margulies restates this dichotomy as one between the “professional” approach that stresses emotional detachment and sees winning cases as the goal of representation, and personal approach where time-consuming and emotionally connected lawyer-client relationships are established, and successful outcomes are far more complicated than winning or losing cases. Margulies, *Political Lawyering*, *supra* note 7, at 502.

101. Interview with Susan Vickers, *supra* note 16.

legal services to victims of domestic violence that this reluctance can be addressed, if not overcome. This task, however, may be far more challenging given the realities of rape, the individuals most often assaulted, and the response of those around them.

At a very fundamental level, the experience of rape defies the ability of the victim to seek help and the ability of those around her, including the legal system, to respond to her needs. Rape, whether seen as a means of gender, race, class, age or other forms of oppression, is also a devastating attack on the physical, psychological and sexual integrity of the individual victim.¹⁰² Furthermore, the most common forms of rape—rape by those known to the victim—involve a betrayal of trust that adds to that devastation.¹⁰³ It is not uncommon for victims to be immobilized by the trauma of rape and its psychic aftermath.

Yet few individuals not victimized themselves can comprehend the destructive impact of non-stranger rape, particularly on adolescent girls and college age women.¹⁰⁴ This impact is compounded by the fact that this form of rape is the least acknowledged by society and least punished by the legal system.¹⁰⁵ Except in some cases of stranger rape, victims often fail to acknowledge their own victimization. When they do, they often blame themselves for the assault.¹⁰⁶ In the case of young women, their inexperience in sexual situations combined with a normal adolescent desire to experience sex adds both to their vulnerability to attack and their subsequent feelings of personal responsibility.¹⁰⁷ Feelings of shame, guilt and personal responsibility

102. See generally ESTRICH, *supra* note 28; HERMAN, *supra* note 55; Giampetro-Meyer, *supra* note 18 (arguing exemption should exist in workers compensation statutes to allow victims of work related rapes to file tort actions against employers). Andrea Giampetro-Meyer devotes a section of her article to a particularly compelling description of the impact of rape on a victim. Giampetro-Meyer, *supra* note 18, at 87-89.

103. See Simon, *supra* note 63, at 496 (noting “reality that over 80% of rapes and sexual assaults are committed by acquaintances”).

104. See Simon, *supra* note 63, at 490-95 (discussing prevalence of non-stranger rape). See generally Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol Related Acquaintance Rapes*, 47 STAN. L. REV. 115 (1994); Levesque, *supra* note 38; Sousa, *supra* note 38; Steinberg, *supra* note 28. An adult woman raped by a stranger in her home or on the street embodies the universal representation of the sexual assault victim. While such victims comprise only a small minority of persons who are raped, they are nevertheless presumed to be the most traumatized by their experiences and the most deserving of sympathy and services. As Susan Estrich (a victim of stranger rape) discussed, however, the distinction between “real rape” and the most common forms of sexual assault is unwarranted, and the disparity in treatment of these victims only further victimizes the majority of those who are raped. See generally ESTRICH, *supra* note 28.

105. See Simon, *supra* note 63, at 496-99. Simon observes that “[m]any cases that fit the legal definition of rape are not treated as a crime by the criminal justice system” and that “[o]f all sexual assaults and rapes committed against women [twelve] and older, 82% are perpetrated by people known to them.” *Id.*

106. Simon, *supra* note 63, at 501-05 (explaining deterrence factors in rape reporting). Simon explains that “[e]ven if a woman defines her assault as rape, she is highly unlikely to report the crime, particularly if the perpetrator is someone she knows.” *Id.* at 501; see also Pillsbury, *supra* note 63, at 847-48 (observing female victims often blames themselves for provoking attack or being vulnerable and often deny extent of wrong done to them).

107. See Levesque, *supra* note 38, at 350-51.

increase if one adds to this mix the common presence of alcohol and drugs.¹⁰⁸ In these situations, the response of those adults who might offer understanding, support and protection (i.e., parents, teachers, law enforcement) is often quite the opposite, and they too blame the victim just as she blames herself.¹⁰⁹

These realities explain why many victims do not disclose their sexual abuse to anyone, and only a minority seeks rape crisis counseling, professional medical or psychiatric assistance, or criminal justice intervention.¹¹⁰ Unfortunately, the victim's failure to seek help can create further damage, for the process of recovery from sexual assault is complex, and treatment must be comprehensive.¹¹¹ Thus, while rape often has a ripple effect by creating many civil legal problems, it often disables its victim from seeking the legal services she needs.

2. *The Dominant Paradigm: A Criminal Justice Response*

As evident from the preceding sections of this Article, the dominant paradigm in the legal system's response to rape is a criminal justice response. It is in the criminal justice system where most lawyers and advocates for rape victims are employed, and it is through criminal actions that rape law and legal reform is addressed. As was true for many family law lawyers who failed to address domestic violence in the lives of their clients, many civil lawyers believe that the criminal justice system will provide rape victims with whatever remedies are needed. Limiting our legal response to rape to the criminal justice system, however, fails to serve the vast majority of rape victims who never report their rape to law enforcement.¹¹² For those who do report, few cases are prosecuted, and even fewer result in convictions and meaningful sentencing.¹¹³

Even if an effective community-based anti-rape movement could motivate victims to use the criminal justice system, that system has inherent limits in its ability to address victims' civil legal needs. First, it is not the function of anyone in law enforcement to represent the victim. Police are charged with investigating cases, prosecutors represent the state in its effort to hold criminals accountable, and judges are ultimately responsible for ensuring that defendants are deemed innocent until proven guilty beyond a reasonable doubt. All of these actors share a responsibility and concern for the safety and welfare of victims of crime. When the interests of victims conflict with their professional responsibilities, as they often do, ethical members of the criminal justice

108. See Levesque, *supra* note 38, at 349-50.

109. See Levesque, *supra* note 38, at 348-49.

110. See Levesque, *supra* note 38, at 348-49.

111. HERMAN, *supra* note 55, at 155-56.

112. See Seidman & Vickers, *supra* note 3, Part III.

113. See Simon, *supra* note 63, at 503-04; *supra* note 14 (noting infrequency of rapes reporting and prosecution); *cf. supra* note 13 (discussing establishment of legal clinics at Lewis & Clark Law School designed to better represent victims' rights).

system cannot prioritize the victims' needs. For example, advocates working in the prosecutor's office can do valuable work in supporting victims through a prosecution, but information they receive from a victim must be disclosed to the defendant if it constitutes exculpatory evidence.¹¹⁴

Equally important, the role of police, prosecutors, and judges prevents them—by definition of their job—from providing what a rape victims needs most: control over her recovery after the assault.¹¹⁵ A civil lawyer, particularly one who meets her client at or near the time of the assault, has the professional freedom, indeed the ethical duty, to empower the client to make her own choices, and to facilitate whatever action (or inaction) the victim chooses.¹¹⁶ Law enforcement personnel cannot undertake this role because they represent the interests of the state.

Finally, independent of the limited role and ethical responsibility of actors within the criminal justice system, giving law enforcement personnel the responsibility for vindicating the civil legal rights of rape victims is a poor allocation of responsibility. While criminal justice professionals must increasingly act as social welfare workers, they are not trained civil legal providers. We cannot ask all things of all people; even within civil legal services, lawyers specialize in substantive legal areas in order to provide the highest quality of representation. Criminal justice remedies are not unimportant, but they must be augmented with civil legal representation.

3. *Practical Limitations: Screening out Rape Victims at Intake*

Although arguably subject to change, there are limitations within the

114. See *Commonwealth v. Liang*, 747 N.E.2d 112, 116 (Mass. 2001). In a case of first impression, the Massachusetts Supreme Judicial Court affirmed the principle that victim witness advocates hired by the District Attorney's office are included within the state statute's definition of "prosecutor" and are therefore members of the prosecution team. *Id.*

115. See HERMAN, *supra* note 55, at 133-34. As previously discussed, rape profoundly disempowers its victims. Client empowerment—permitting the client to define her needs, assess what action will make her safe, and control decision-making—originated in the earliest days of the rape crisis and shelter movement, and its importance is now recognized by professionals from all disciplines. It is not sufficient, however, that a victim be provided with a single client-empowering advocate. No intervention that takes power away from the survivor can foster her recovery. Thus, everyone who assists the victim, including the victim's lawyer, must be committed to client-controlled decision making.

116. Our current legal system, both criminal and civil, is hierarchical, institutionally rigid, and unfriendly to client-centered litigation. Few lawyers, even those coming from the poverty law movement of the 1970s, were trained to value or practice client-empowering advocacy. Some civil lawyers who represent battered women have demonstrated that within the rules governing private lawyer-client relationships, they can work on a client empowerment model, and that they must. See Susan Bryant & Maria Arias, *Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMPOR. L. 207, 216 (1992); Lois H. Kanter et al., *Northeastern's Domestic Violence Institute: The Law School Clinic as an Integral Partner in a Coordinated Community Response to Domestic Violence*, 47 LOY. L. REV. 359, 366 (2001); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1035 (1997).

legislatively mandated and traditionally imposed eligibility requirements of civil legal services programs. These limitations have contributed to the invisibility of rape victims by essentially screening them out of the client pool before their needs are even identified. These limitations include income eligibility rules and how they are interpreted, a focus on families, and restrictions (real or imagined) on serving minors.

Income eligibility, and particularly how it is applied, is the most effective means of screening out high school and college students, who are the most common rape victims. There is a presumption that minors share the resources of their family, and therefore they may not be eligible for service based on their family's income. Yet the assumption that youthful victims of rape have or would request access to family income is fundamentally flawed. As discussed earlier, disclosure of rape to family members is not common, nor would it necessarily gain victims the support—financial or otherwise—that the assumption of access to family income contemplates. By interpreting income eligibility to include family resources, civil legal programs establish an insurmountable barrier for most high school and college age women to access to free legal services.

An emphasis on serving *families* also contributes to the screening out of some rape victims. Among legal services programs nationwide, families—and for family law related cases, only custodial parents with children—are given priority for the limited full legal representation that remains available. Once a family is a client, most programs will give them priority for legal service to resolve other issues. Beyond families, programs will often prioritize the elderly or single disabled adults. Rape victims are typically young adults, and although rape may create significant medical and emotional problems, youthful assault victims seldom identify themselves, or are identified by programs, as disabled.¹¹⁷

The trend among legal services programs to conserve resources by providing brief advice and service, limited representation, or referral to pro se clinics rather than full representation also works against victims of rape. Victims of domestic abuse or sexual assault typically have a range of needs not easily met through abbreviated legal service. As trauma victims, they can require a degree of lawyer-client involvement and support far beyond that of an average

117. One area that a legal services organization should explore is the extent to which rape victims are disabled by their experience of sexual assault, and whether the victims are entitled to priority in service or particular governmental benefits. For example, many victims suffer varying degrees of post traumatic stress disorder (PTSD), a recognized psychiatric disability that may result from assault. Others may suffer physical injuries or rape-related medical problems. Such disabilities may be the basis for requesting victim compensation from the criminal justice system, disability accommodations from academic institutions or employers, or disability related health care, financial assistance, or housing priority. Viewed as disable applicants for legal services, rape victims might well fit within current legal services priorities for client service.

client.¹¹⁸ These clients are resource intensive, and in a time of diminishing funding, these are precisely the opposite of the type of cases most civil legal service programs would choose to embrace.

Although beyond the scope of this article, there are particular issues that arise when serving a rape victim who is a legal minor. These issues, which must be addressed, include: whether the minor can seek restraining order protections, whether the minor's parents must be notified, whether a guardian must be appointed, and whether the lawyer represents the wishes of the minor or her best interests.¹¹⁹

4. *Practical Limitations: The Challenges for Civil Lawyers*

The reluctance of civil legal services attorneys to take on sexual assault cases may also be a function of their inexperience in dealing with criminal issues. It is inescapable that representation a crime victim, even on civil matters, requires familiarity, and at times interaction, with the criminal justice system. While most victims of sexual assault do not pursue criminal remedies, civil lawyers must make these victims aware of their rights as well as their vulnerability in the criminal justice system, and take early action to protect them. These lawyers must often interact with criminal justice professionals to secure information and cooperation with respect to a purely civil issue, and may be called upon to represent the victim on privacy or privilege issues ancillary to a criminal prosecution. In our experience in representing victims of domestic violence, such interaction can be unexpectedly difficult, and therefore information and experience is required.¹²⁰

Additionally, lawyers who advocate on behalf of victims of trauma can expect to experience greater psychological stress than their colleagues, a burden that they may not be willing or able to assume. Rape is a profoundly disempowering experience for the victim, but establishing a client-empowering relationship with the victim challenges the lawyer as well. An empowering lawyer not only commits herself to a more personal and time-consuming

118. Margulies, *Representation of Domestic Violence Survivors*, *supra* note 7, at 1076-77.

119. In Massachusetts, the courts and legislature have addressed these issues in other contexts, including domestic violence litigation, parental consent to abortion, and juvenile law. In each of these contexts, the courts have treated the more "mature" minors as having rights similar to those of legal adults. Thus, the legal status of these minors does not particularly compromise the role of the advocate, despite complications related to their age.

120. Law enforcement, like many bureaucracies, is not always responsive to requests for information or assistance. Moreover, police departments and prosecutors' offices are particularly sensitive to issues of territory, hierarchy, power, and control. These organizations often view the activities of civil lawyers acting on behalf of victims as an intrusion (at best) or a challenge to their authority (at worst). Although lawyers are trained to face adversarial situations, victims of crime need to perceive law enforcement personnel as supportive, rather than hostile, because they are often dependent on them during the criminal process. These matters are further complicated because, in most jurisdictions, the victims and their lawyers have no standing in criminal cases, and therefore it may be particularly important to develop good relationships with police and prosecutors.

relationship with the client, but in working with victims of trauma, the lawyer exposes herself to profound emotional risks. Judith Herman provides a compelling description of the dangers for psychotherapists, but her words are equally applicable to legal advocates:

Trauma is contagious. In the role of witness to disaster or atrocity, the therapist at times is emotionally overwhelmed. She experiences, to a lesser degree, the same terror, rage and despair as the patient. This phenomenon is known as "traumatic countertransference" or vicarious traumatization. The therapist may begin to experience symptoms of post-traumatic stress disorder. Hearing the patient's trauma story is bound to revive any personal traumatic experiences that the therapist may have suffered in the past.¹²¹

The dialectic of trauma constantly challenges the therapist's emotional balance. The therapist, like the patient, may defend against overwhelming feelings by withdrawal or by impulsive, intrusive action. The most common forms of action are rescue attempts, boundary violations, or attempts to control the patient. The common constrictive responses are doubting or denying the patient's reality, disassociation or numbing, minimization or denial of the traumatic material, professional distancing, or frank abandonment of the patient.¹²²

To counter these impacts, Herman advises those who work with trauma victims not to work in isolation, but to develop a secure and reliable support system. She also stresses both the importance of an accepting professional community, while acknowledging that those working with trauma victims inevitably come into conflicts with their colleagues. Finally, she emphasizes the need for a balanced professional and personal life.¹²³

Unfortunately, many lawyers for victims of violence do work in isolation and many do not have reliable support systems. Unlike therapists, these lawyers are often trapped by their advocacy role in structured adversarial relationships with individuals whose job it is to cast doubt on the validity of their client's experience. Thus, it is not surprising that the "burn-out" rate among lawyers working with trauma victims is high, and that others are reluctant to take their place.

IV. EXPANDING LEGAL SERVICE TO RAPE VICTIMS

Despite these challenges, there is reason to believe that the legal services community can address its failure to serve the many victims of sexual assault. As interwoven through earlier discussions, battered women's advocates have provided a model. Few in number, but tapping into the strengths of the non-legal community and the evolving consciousness of the legal system, a small

121. HERMAN, *supra* note 55, at 140.

122. HERMAN, *supra* note 55, at 151.

123. HERMAN, *supra* note 55, at 151-53.

group of legal activists created a strong legal movement to serve victims of domestic violence that now involves all segments of the civil legal services community. Legal advocates for victims of sexual assault, also relatively few in number, have begun a similar process. The time is now ripe for the larger civil legal services community to join them.

The recent initiative by the OVW to fund sexual assault service programs provides an important impetus for expanding the involvement of the civil legal services community in this important work. Federal funding alone, however, will not create effective service programs. In the past decade, we learned some important lessons as we worked to expand the involvement of traditional legal services organizations in serving domestic violence victims. First, we must be prepared to educate all legal advocates, including experienced attorneys, in the particular dynamics of sexual assault and the need to employ a client empowering model of lawyering when working with its victims. Second, these advocates must be trained in the particular civil legal needs of rape victims, and must be prepared to advise and represent clients in legal arenas where they may have little experience, such as criminal actions, adjudicatory proceedings, and civil tort litigation.¹²⁴ Third, lawyers who develop programs to serve rape victims must understand the importance of collaboration with non-legal service providers and with law enforcement, both to maximize service to victims and minimize their vulnerability to revictimization in the legal system. Finally, lawyers must collaborate with one another: no single approach to civil legal services provision can hope to accomplish what can be done by harnessing all potentially available civil legal resources.

A. Education of Legal Advocates in the Dynamics of Sexual Assault

Lawyers and legal advocates who serve rape victims must be thoroughly educated about the dynamics of sexual assault. The prevalence and severity of sexual assault, particularly among young girls and women, is not well known. The trauma of rape, particularly by acquaintances, and the recovery process are not self-evident. The impact of disclosure and the decision to take legal action, or refrain from doing so, is complex and can be counter-intuitive to those not trained in sexual assault. Also, the clients' need for control of the legal process must be thoroughly understood and accepted.

Lawyers who are new to this work do not simply absorb this information and incorporate it into their legal practice. In domestic violence work, lawyers, particularly experienced lawyers, focus on the legal remedies *available* to victims, rather than on the victim's actual needs and important safety, mental health, and social concerns that may limit her options.¹²⁵ When lawyers are not

124. See Seidman & Vickers, *supra* note 3, Part IV.

125. See generally JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICE (1997). Jill Davies, a nationally recognized domestic violence lawyer, calls this

trained in the importance of client-empowering advocacy, they often adopt traditional lawyering roles. As such, they may limit the time spent listening to and understanding the totality of their client's experience, recommend legal options and strategies, and speak for their client in tense negotiations and court proceedings. In representing battered women, this type of lawyering is both ill-suited to the emotional needs of trauma victims and can increase the lethality of the perpetrator.

Legal advocates who have worked on hotlines, at rape crisis centers, or in other community locations where victims first turn for help are generally the best prepared to do this work. Therefore, inexperienced legal advocates should be encouraged and provided opportunities to do direct, non-legal service work in these locations. Staff from these rape crisis organizations can also be employed to train lawyers and legal advocates without direct rape crisis experience.¹²⁶ As will be discussed later, establishing relationships with rape crisis centers and other sexual assault service providers will also enrich other elements of a sexual assault legal practice.

B. Identifying the Civil Legal Needs of Rape Victims

The first civil legal services lawyers to focus on battered women were family law attorneys,¹²⁷ and their initial response was to prioritize these clients for traditional family law services. Many of their clients—who were often placed on waiting lists for several months or more—had suffered their most serious abuse months, and sometimes years, before they obtained this family law representation. In the interim, serious physical injury, crippling psychological impacts, and destabilization of the victim's income, housing and related supports had already occurred. These impacts were often difficult and,

approach “service-defined,” rather than “woman-defined,” advocacy and argues that all too often we disempower and endanger victims of violence by only providing them with the services we have to offer, rather than attempting to identify and meet their needs. Her book provides a very practical guide to safety planning based on these principles. See *supra* note 115 and accompanying text (discussing effects of rape on women's self-confidence).

126. At Northeastern's Domestic Violence Institute, the best student advocates are those who come to law school with direct domestic violence or sexual assault service experience, and we encourage students new to this work to volunteer on hotlines and at shelters and rape crisis centers. In addition, to provide inexperienced students with comparable training, we have developed an interviewing and service program in the emergency department of a local hospital. This approach enables students to learn about the dynamics of domestic violence from the victims' perspective. They see our clientele as far more resourceful and resilient in dealing with violence than they had anticipated. They also see the role that the legal system plays, or fails to play, in addressing violence in the lives of these women. See generally V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering and Multidisciplinary Problem-Solving in a Clinical Context*, 9 CLINICAL L. REV. 83 (2002) (describing clinical training program at Northeastern University School of Law).

127. Legal services lawyers have always provided family law services to battered women, but before public attention was focused on domestic violence, battered women were seldom identified as a discrete population in need of particular services.

at times, impossible to reverse and adversely affected the victim's later success in family court. A new generation of activists, many of them formerly battered women, identified a far broader array of civil legal needs of battered women and motivated attorneys to broaden their practice beyond their established offices. Civil legal services lawyers now routinely provide lethality assessment and safety planning, restraining order advocacy, civil advocacy in criminal matters, and emergency housing, income benefits and immigration assistance, often in community locations where battered women first turn for help.¹²⁸

Similarly, the civil legal needs of the victims of sexual assault are most critical in the days, weeks, and months following the assault. While their needs for safety, stability, and services can be quite similar to those we now address on behalf of victims of domestic violence, rape victims and their advocates confront challenges that victims of family violence may not face.¹²⁹ Unfortunately, however, few civil legal services can, at this time, identify these needs,¹³⁰ and even fewer have the expertise and experience to address them.

Thus, the starting place for advocacy must be intensive training and technical assistance. Fortunately, OVW has committed itself to providing this training through a national technical assistance and training contract, and a number of sexual assault programs have developed legal materials, the most comprehensive of which is the Attorney Practice Manual developed by the Victim Rights Law Center (VRLC).¹³¹

128. In Boston, this process was initiated by Sarah Buel, a formerly battered woman and experienced legal services paralegal, who came to Harvard Law School in 1987. Sarah motivated literally hundreds of her classmates to form a battered women's project to advocate for women in lower court hearings to obtain restraining orders, and students at other schools followed suit. In 1989, Northeastern law students formed a legal project at Casa Myrna Vazquez, which today employs three lawyers and two legal advocates. In 1992, Northeastern's Domestic Violence Institute established a restraining order clinic on-site at the Dorchester Court, and, in 1993, the program began serving clients in the Emergency Department at Boston City Hospital (now Boston Medical Center). Shortly thereafter, recent Northeastern graduates established the Family Advocacy Program, a "full-service" legal clinic in the pediatrics department of that same hospital. Later, Greater Boston Legal Services (GBLS) out-stationed its legal staff to create restraining order clinics at two local family courts, and most recently GBLS is providing targeted family law services to an array of domestic violence programs at local hospitals and health centers.

129. Most rape victims are younger, and therefore their needs may vary from the needs of domestic violence victims. Advocacy within educational institutions is critical for these younger women, while, because many do not have children, fewer of these victims need legal representation in family law matters. As discussed earlier, the problems rape victims encounter in criminal prosecution—privacy, privilege, and the defense of consent—can make this legal practice more complex.

130. Established lawyers, including domestic violence advocates, are commonly perplexed when the issue of providing civil legal services to non-domestic rape victims is raised. Most of these lawyers are truly surprised, and often sheepish, when the broad scope of these victims' common legal needs are described to them.

131. The OVW has contracted with the VLRC to provide training and technical assistance to grantees funded under their LAV grant program. The VRLC's training manual, *BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION'S RESPONSE TO RAPE: A PRACTICAL GUIDE TO REPRESENTING SEXUAL ASSAULT VICTIMS*, is distributed free of charge to LAV grantees and available for purchase at <http://www.victimrights.org/html/7-manual.htm> (last visited Jan. 10, 2005).

C. Collaboration with Community Groups and Law Enforcement Agencies

The benefits of close relationships with other community social service providers and law enforcement agencies that interact and provide services to rape victims cannot be overestimated. Rape crisis centers, sexual assault nurse examiner (SANE) programs,¹³² anti-violence organizations at high schools and universities, and community health centers and hospitals all provide critical services to victims and can also make timely referral of victims to legal projects. Their staff can also provide invaluable training and on-going consultation to legal services projects on the dynamics of sexual assault and its impact on victims.

Civil legal projects should also develop effective collaborations, or at least open lines of communication, with law enforcement agencies.¹³³ Depending on the circumstances of the assault, law enforcement may be critical to establishing and maintaining the client's safety and providing her with other benefits, including criminal prosecution. In dealing with law enforcement agencies, however, it is important to remember that the state's interest in prosecution may be adversarial to the victim's interests.¹³⁴ Therefore, civil lawyers should seek to establish relationships with law enforcement personnel that acknowledge and accommodate the heightened need for client confidentiality and the possibility that conflicts of interest may arise between law enforcement personnel and the victim and her civil representative.¹³⁵ This is especially true for any relationship developed between a client, her civil legal

132. Charged with evidence collection in cases of sexual assault, SANE personnel are trained not to take on the role of an advocate. SANE staff members, however, are medical professionals deeply concerned over the health and welfare of their patients. They address health related problem—such as substance abuse, pregnancy, HIV and other STD prevention—that may be implicated in a sexual assault, and provide invaluable information and support to rape victims. Because they are often the first person to speak with a rape victim after she self-identifies, they play an important role in the early decisions that the victim will make.

133. Police, prosecutors, probation, correction and parole officials at the local, state, and federal levels could all become involved (or fail to become involved) in any particular case. Even if the victim currently contemplates no criminal action, these agencies may have important information to share. These law enforcement agencies are organized differently in each locality, but many of them have specialized staff to handle sexual assault, domestic violence, and child abuse cases. Law enforcement staff can provide valuable services to victims who choose to cooperate with criminal prosecutions, including governmental victim advocacy, victim compensation, priority for housing and other services, and help in securing legal immigration status. Even in the absence of prosecution, these services are often available. Finally, correction, probation, and parole personnel may be able to provide important information on suspects with prior criminal histories, and they can also be invaluable in alerting victims to the status of the offender post-arrest and post-conviction.

134. Police and prosecutors may decline to commence or follow-through on criminal charges or, in the context of a prosecution, may not protect victims' privacy or privileges. They can also dismiss or settle cases against victims' wishes. On the other hand, many victims decide—either initially or later—not to cooperate with a criminal action that may nevertheless be prosecuted despite their lack of cooperation.

135. In our experience, police and prosecutors are less aware of, and accommodating to, client confidentiality between a civil advocate and the victim than they are of the more traditional confidentiality afforded a defendant and his attorney. Therefore, victims' lawyers must be prepared for their role as a confidential advocate to be questioned or subtly challenged, and for law enforcement to fail to recognize conflict-of-interest situations as they may arise.

advocate, and victim advocates working within police or prosecutors offices.¹³⁶

Working across professional disciplines is not easy, and differences of opinion and approach to service delivery are inevitable. The hierarchical, authoritarian, and often adversarial values that permeate legal education and culture, as well as law enforcement, make it difficult for civil lawyers, prosecutors, and the police to work collaboratively both with one another, and with non-legal service providers.¹³⁷ Moreover, many medical, mental health and social services professionals can be both intimidated and exasperated by the legal system (and those who work within it). Legal and ethical rules that require a lawyer to maintain client confidences and to advocate zealously for her client under all circumstances are often misunderstood by non-legal community partners, and these misunderstandings further exacerbate tensions in relationships. Unfortunately, many social service providers and law enforcement personnel are unsympathetic to the constraints that these ethical considerations place on collaborative activities with civil lawyers. Conflicts between civil lawyers and their community partners may be particularly acute if a legal project is developed within a domestic violence shelter or rape crisis center,¹³⁸ or if the legal project is asked to co-locate with other providers in order to provide coordinated service at community locations accessible to victims.¹³⁹

136. Lay advocates working in prosecutors' offices are an important source of support for victims and their survivors in the criminal justice process, and many police departments have hired civilian advocates to do similar work. It is vital, however, that the role of governmental and non-governmental advocates be clearly defined and that each victim be aware of the particular roles and responsibilities of each type of advocate *before* speaking to them. In particular, victims should be aware that advocates in police and prosecutors' offices are not confidential advocates. In fact, these advocates have important law enforcement responsibilities that may adversely affect the victim, such as mandatory reporting of child abuse, disclosure of exculpatory evidence to the defendant, responding to requests for discovery of potentially privileged information, and compelling a victim to testify. In our experience, governmental advocates, often fearful that victims may be afraid to accept their services, often fail to fully explain the limits of their confidentiality and their affirmative obligations as members of law enforcement.

137. *See supra* note 120 (pointing out impediments to collaboration within legal system). Just as the values that permeate legal culture made it difficult for battered women's lawyers to adopt a client empowering model of representation, these values also make it difficult for lawyers and law enforcement personnel to collaborate with one another and with non-legal community partners.

138. For example, although Northeastern University Law School initially placed a clinical instructor and her students "in house" at Casa Myrna Vazquez, a local shelter for battered women, conflicts over confidentiality and privilege lead to an early relocation of the law students from the shelter back to the law school. Several years later, however, attorneys employed at Casa Myrna carefully crafted policies, procedures, and information systems that separated their work from that of shelter staff, and this legal project continues to operate within the organizational structure of the parent shelter. More recently, the VRIC, which was first developed within its parent organization, the Boston Area Rape Crisis Center (BARCC), faced a similar challenge and chose a different path. Facing a threat to the privileged status of information (VRIC's attorney-client privilege and BARCC's rape crisis counselor privilege), as well as actual and potential conflicts of interest, the VRIC first moved its offices to a separate location and later incorporated as a separate non-profit corporation, albeit with a continuing commitment to coordinated planning and operations with BARCC.

139. In theory, "co-locating" civil lawyers with law enforcement and social service providers at community locations, without any merging of organizational structures, is ideal for providing clients with "one-stop

Finally, one cannot ignore existing or potential conflicts created by competition for funding. The funding of legal initiatives is threatening to non-legal social service providers, whose budgets are always vulnerable to federal and state reductions in support. Funding can also pit civil legal service organizations against one another, particularly as federal funding for legal services is reduced. Although these conflicts can be addressed through open communications and collaborative fundraising efforts, they can never be eliminated. The one positive note here is that most of those who provide funds believe that multidisciplinary collaborations are the best way to address complex social problems, and thus strong collaborations can attract funds that the individual groups or agencies would never attract.¹⁴⁰

D. Collaboration Among Lawyers and with Existing Legal Projects

All new sexual assault legal projects must leverage scarce resources if they are to significantly expand services, because funding for most projects will only employ a handful of legal staff. The challenge is to mobilize, train, and organize a larger network of lawyers who will represent individual victims of sexual assault, and who will represent their interests in community education, impact litigation, and legislation and lobbying. The best way to leverage resources will depend, of course, on the legal resources available in any given area and on the success or failure of legal organizations' past collaborative efforts.

While the legal resources in every community will differ, the experience of the VRLC provides an illustration of how one project is attempting to expand the number of lawyers available to serve its clients by forging links with other legal resources. The process began when VRLC created its first advisory board, the majority of whose members were established attorneys from a range of legal practice backgrounds but who were all experienced in working with victims of violence. Simultaneously, the VRLC was attracting volunteer students from Boston's law schools, and the participation of clinical law

shopping." The providers also benefit because they can easily communicate and coordinate their activities. In an effort to obtain these benefits, co-location of all domestic violence and sexual assault services is now being promoted by OVW's Family Justice Center (FJC) initiative. This effort, however, can only be successful if the privacy of client information remains under the clients' control, and clients are able to choose which services they want to access, and which they want to avoid. This requires that all parties are prepared to place strict limits on information sharing within the FJC and on their access to clients entering the center, limitations that some governmental agencies and institutions may find troubling. Thus, while co-location has a great many advantages for both victims and providers (and is a model that our Domestic Violence Institute has consistently supported), it is not a simple concept to implement.

140. This has been the situation in Boston where broad interdisciplinary collaborations have attracted millions of dollars in federal funding that would not have gone to any independent agency or institution. Moreover, even where there might be a financial disincentive to request funding as a collaboration rather than individually, our experience in Boston suggests that sharing grants has the non-monetary benefits of promoting greater—although certainly not always harmonious—collaborative activity.

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teachers active in domestic violence prevention efforts. To augment its law school volunteers, the VRLC director reached out to battered women's pro bono projects at the Women's Bar Association (WBA) and at several large Boston law firms. Most recently, VLRC is collaborating with Greater Boston Legal Services in an initiative to provide legal services at Boston's emerging Family Justice Center. VRLC is now connected to virtually every relevant legal services provider in the Boston area.

V. CONCLUSION

I will end this Article as I began it, on a personal note. It is not easy to expand the services one currently provides to a new group of clients, and serving rape victims is particularly challenging. But in addition to meeting the needs of these particularly vulnerable clients, we will be richly rewarded. To paraphrase Judith Herman:

The reward of engagement [with victims] is a sense of an enriched life. [Those] who work with survivors report appreciating life more fully, taking life more seriously, having a greater scope of understanding of others and themselves, forming new friendships and deeper intimate relationships, and feeling inspired by the daily examples of [our clients] courage, determination and hope.¹⁴¹

141. HERMAN, *supra* note 55, at 153.