OBSTACLES IN LITIGATING SEXUAL ASSAULT CLAIMS

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I. Introduction

Every 98 seconds another American is sexually assaulted.[i] After being subject to sexual assault or rape, many victims find themselves further victimized by law enforcement officials who choose not to take action against the perpetrator, grand jury proceedings which are intimidating, families and friends who shun them, and college classmates who ostracize them. Often these victims are completely unaware that the civil justice system may be a path to some modicum of justice, or fear being seen as greedy plaintiffs if they file suit.

In light of these devastating realities, our firm has chosen to represent victims of sexual crimes within the civil litigation framework, and have represented and will continue to represent men, women and children whose lives have been forever altered by sexual assault and rape.[ii] Our clients are fighting to regain some control over their lives, and we are fighting to find any monetary relief that we can on their behalf.

In this paper, we do not seek to provide a comprehensive overview of the world of these broad civil claims, but rather a discrete analysis of some of the challenges we face in seeking justice.

II. Sexual Assault – The Numbers

Every year, over 321,000 Americans age 12 and older are sexually assaulted or raped in the United States[iii]. Per annum, 60,000 children are victims of "substantiated or indicated" sexual abuse[iv]. 18,900 military personnel experience unwanted sexual contact on an annual basis.[v] One out of every six women has been the victim of an attempted or completed rape in her lifetime[vi]. During a 1-year period, 16% of youth ages 14 to 17 have been sexually victimized.[vii]

In 2001, Human Rights Watch estimated that at least 140,000 inmates have been raped while incarcerated in the United States.[viii] In 2011-2012, 4% of state and federal prison inmates,

and 3.2% of jail inmates reported one or more instances of sexual assault within 12 months of admission to the facility.[ix]

Numerous sources agree that the numbers of individuals who have been subject to sexual assault and abuse are grossly underreported.[x]

III. What's the Story? – Vetting Civil Sexual Assault Claims

Assessing the viability of recovering for a victim of sexual assault relies upon many of the assessment tools we lawyers routinely utilize in evaluating other claims – namely, evaluating insurance coverage, the veracity of the potential client's story, the friendliness of the jurisdiction, and the availability of supporting evidence. Yet, the evaluation of these cases also require a firm grasp of the detailed facts, the potential defendants, and the emotional state of the potential client.

Indeed, the lasting psychological impact of the assault, the shame associated with being the victim, and fears of not being believed make discussions with victims difficult. Minor victims pose additional concerns - namely, the ability to communicate the nature and extent of the assault, whether the child's story has been impacted or shaped by third parties, the impact of litigation on the child's psyche, and whether the parents will be able to withstand the difficult road which often lies ahead.

Due to these considerations and the incendiary nature of the allegations, sexual assault cases often present a strong opportunity for pre-litigation settlement. Depending on the defendant, the threat of litigation is often sufficient to motivate early resolution. This is always to be presented

to clients as an option as while many clients seek public vindication, others seek a quieter and quicker resolution of their claims.

At the end of the day, the goal is to ensure that (1) a traumatized victim will not be further traumatized by being thrown into a legal battle that she or he cannot win; and (2) that he or she will realize some modicum of justice.

IV. The Victims

a. Minors

The difficulties facing minors in establishing that they have been sexually assaulted, and in availing themselves of the civil justice system include automatic challenges to the truthfulness, accuracy, and independence of their allegations. Specifically, the public's perception of young children as unreliable witnesses as it relates to sexual assault has been tied to the preschool sexual abuse scandals of the 1980s to the 1990s.[xi] Challenges to allegations levied by children are often based on the sense that children are highly prone to suggestibility:

> …a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy.[xii]

In addition, the age, emotional and psychiatric posture of these victims make them more susceptible to being intimated and confused by defense counsel, and those seeking to block them from recovery. Often, victims find themselves ostracized by those in their communities, and moving forward with such claims become more than they can bear.

b. Adult Assault Claims

Adults subject to sexual violence face many pitfalls in attempting to secure monetary relief.

Often adults have waited too long to bring claims due to the stigma, fear and shame associated with being a "victim" of sexual assault. Unless the individual is in a state that enjoys an expanded statute of limitations or "window legislation," as described below, the individual may find themselves without any civil options.

Due to the emotional nature of such litigation, assessing the true risk of recovery early in the litigation is crucial.

V. Statute of Limitations and Sexual Assault Claims

Nearly ever state has a tolling provision which delays the application of the respective statutes of limitations until a number of years after the age of majority is realized by a victim[xiii]. State laws vary with respect to the number of years a victim has to report an injury after reaching the age of majority[xiv]. Despite these tolling provisions, a vast number of victims find that by the time they are emotionally prepared to face their assailant and/or are even aware that the civil system may provide a remedy, they are far beyond any applicable statute of limitations.

Many states have moved forward with and are considering "window legislation" or "reviver statutes." Under these extended statute of limitations provisions, survivors of sexual abuse have larger time frames in which to file claims. For example, in California, a victim can file a claim for childhood sexual abuse on or after the victim's 26th birthday " if the person or entity against whom the action is commenced knew, had reason to know, or was otherwise on

notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and implement reasonable safeguards, to avoid future acts of unlawful sexual conduct".[xv] In Connecticut, the statute allows action within 30 years from the date the victim reached the age of majority[xvi]. In Georgia, victims of childhood sexual abuse committed on or after July 1, 2015 may file suit on or before the date the plaintiff attains the age of 53.[xvii]

These are but three of the states taking pro-active steps to address the natural fear and psychological trauma that prevents sexual abuse victims from coming forward until many years have passed, and to ensure that those who commit wrongful acts are held accountable. Still, many states, such as Alabama, have failed to pass similar legislation. In Alabama, victims of childhood sexual assault only have two years from the age of majority in which to assert a personal injury claim.[xviii]

VI. Immunity Concerns: Government Defendants and the Deliberate Indifference Standard

"Qualified immunity offers complete protection for individual public officials performing discriminatory functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sherrod v. Johnson*, 667 F.3d 1359, 1363 (11th Cir. 2012).

Any sexual assault claim, whether rooted in state (*i.e.*, assault, battery or false imprisonment) or federal law (i.e., 42 U.S.C. §1983, Title IX, or FTCA), against a government defendant will turn on whether the plaintiff can properly plead and establish deliberate indifference, thus defeating defendants' claims to qualified immunity.

State Actors

In *Doe v. City of Demopolis*, 461 Fed. Appx. 915 (11th Cir., 2012), an officer of the City of Demopolis was accused of having sexual relations with a 13-year old girl. He was subsequently convicted of two counts of second-degree rape. In dismissing Doe's claim filed pursuant to 42 U.S.C. §1983 that the city violated the Fourteenth Amendment by failing to train the officer, the Court held the failure to train a police officer to refrain from taking that action will usually not show deliberate indifference. The Court found that the city was entitled to rely on the officer's common sense to not commit statutory rape, so its alleged failure to train him not to commit statutory rape did not show deliberate indifference to the plaintiff. The court found for the defendant police chief, despite evidence that the police chief testified during his deposition that four years before he heard that the same officer was engaged in sex with another minor.

See also Doe v. North River Ins. Co., 719 F. Supp. 2d 1352 (M.D. Fla. 2010)(city's personal injury policy covering assault and battery did not cover police officer's rape and sexual battery of a minor, and public policy precluded coverage); *Nimmons v. Gwinette County*, 2014 U.S. Dist. LEXIS 118364 (N.D. Ga., August 25, 2014)(transgender prisoner plaintiff's complaint was insufficient where it failed to provide supportive facts that transgender persons were at a greater risk of sexual assault, and failed to adduce facts to support allegation that Sherriff should have known that transgender individuals faced substantial risk of harm at a detention center).

While the deliberate indifference standard is a high one, it is not impossible to overcome. Rather, it requires a well-contemplated and developed complaint, and a pointed discovery plan that will render the strongest case for pleading and establishing deliberate indifference.

In *H.A.L. v. Foltz*, 551 F.3d 1227 (11th Cir. 2008), Plaintiffs successfully defeated defendant's qualified immunity defense. In *Foltz*, the Eleventh Circuit held that the defendants, employees of the Florida Department of Child and Families Department, were *not* entitled to dismissal of plaintiffs' complaint based on qualified immunity where the defendants placed the plaintiffs in a home with two other foster children, D.C. and J.S., both whom had been subject to sexual abuse and had a history of aggressive behavior towards younger children. Defendants also placed the plaintiffs in said foster home after learning that three children had been removed from the foster home. In finding that the defendants could not hide behind qualified immunity after the plaintiffs (one plaintiff was three years old) was repeatedly sexually assaulted by D.C., the Court held that the defendants failure to remove the plaintiffs from the home after knowing of R.S. and D.C.'s propensities, and after being aware of sexual assault within the home, was sufficient to establish that defendants were not entitled to a dismissal of the claims.

Federal Actors

While victims of sexual assault suffered due to the wrongful conduct of federal employees may seek relief pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of* Narcotics, 403 U.S. 388 (1971) (recognizing an implied cause of action for monetary damages against federal agents who act pursuant to governmental authority),[xix] and the Federal Tort Claims Act ("FTCA"),[xx] victims face similar immunity challenges as described above.

Absent waiver, sovereign immunity shields the federal government and its agencies from suit. *F.D.I.C. v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

While the FTCA provides a limited waiver of of the government's immunity from tort liability, there are exceptions to the limited waiver. 28 U.S.C. § 2680(a)-(n).

As it relates to claims of sexual assault, one of the exceptions to the FTCA's general consent-to-be sued policy retains the government's immunity for any claim arising out of assault of battery[xxi] where the claim results from the act or omission of a federal investigative or law enforcement officer. 28 U.S.C. § 2680(h); *Truman v. U.S.*, 26 F.3d 592, 594 (5th Cir. 1994).

See, e.g., Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) The FTCA precluded negligence action arising out of a postal worker's sexual assault of children where the postal supervisor knew of an earlier sexual incident with a 12-year-old boy, but where the postal supervisor let the employee stay on the job, since suit arose out of assault and battery); *Naisbitt v. United States*, 611 F.2d 1350 (10th Cir.); *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986) (dismissing plaintiff minors patients' negligence actions where they were sexually abused by a staff member at defendant government's hospital where they were being treated as dependents of retired military personnel).

Another exception to the FTCA waiver of immunity which prevents victims of sexual assault from realizing justice is the discretionary function exception. Under the discretionary function, the chief analysis is whether the challenged conduct "involves an element of judgment or choice". *McMellon v. United States*, 387 F.3d 329, 335 (4th Cir. 2004); *Burt v. Johns*, No. 5:10-CT-3156-BO, 2012 U.S. Dist. LEXIS 40596, at *6 (E.D.N.C. Mar. 25, 2012).

See e.g., Donaldson v. United States, 281 Fed. App'x, 75, 76-78 (3d Cir. 2008) (upholding dismissal of an FTCA claim that federal prison employees failed to protect plaintiff

from assault by a fellow prisoner on a finding that the claim was barred by the discretionary function exception); *Alfrey v. United States*, 276 F.3d 557, 565 (9th Cir. 2002); *Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir. 1998) (reversing judgment in favor of prisoner who brought an FTCA action for injuries sustained as the result of an attack by another inmate); *Dykstra v. United States Bureau of Prisons*, 140 F.3d 791 (8th Cir. 1998) (discretionary function exception applied to bar suit for prison officials' failure to warn plaintiff that his youthful appearance might make him vulnerable to attack or to place him in protective custody when plaintiff complained that fellow inmate was staring at him); *Calderon v. United States,* 123 F.3d 947 (7th Cir. 1997) (discretionary function exception applied to FTCA claim for government's failure to protect plaintiff from attack by cellmate); *Buchanan v. United States*, 915 F.2d 969 (5th Cir. 1990)(discretionary function exception applied to FTCA claim for damages by prisoners held hostage during a prison uprising); *see also, Graham v. United States*, 2002 U.S. Dist. LEXIS 1765, 2002 WL 188573 (E.D. Pa. Feb. 5, 2002).

Defeating immunity asserted by federal agents in the *Bivens* context is determined based upon whether the official violated a statutory or constitutional right that was clearly established at the time of the conduct which has given right to suit, and whether the official exhibited deliberate indifference. *See Doe v. Robertson*, 751 F.3d 383 (5th Cir. 2014) (federal officials entitled to qualified immunity in an action brought by female detainees alleging sexual assault, as court found that no clearly established law provided that violations of contractual terms aimed to prevent sexual assault were facts from which the inference could be drawn that a substantial risk of harm existed).

In *Stutson v. Bureau of Prisons*, No. C-11-0397b9-YGR, 2012 U.S. Dist. LEXIS 58035 (N.D. Cal. Apr. 25, 2012), a federal employee alleged that she was raped by an individual whom she believed to be a member of the United States Army (she was unable to identify the perpetrator). The Court found that the plaintiff could not file suit pursuant to the FTCA because she failed to exhaust the administrative remedies, and that sovereign immunity barred her *Bivens* claim against the Bureau of Prisons. It is important to note that implied causes of actions for monetary damages have been especially challenging in cases implicating the military.[xxii] *Marquet v. Gates*, 2013 U.S. Dist. LEXIS 189867 (S.D.N.Y. Sep. 11, 2013).

Defeating immunity in sexual actions against federal actors requires a careful development of the record, and detailed and specific pleadings within the narrow margins of cases which have found the deliberate indifference standard in this context.

Deliberate Indifference and Immunity in Prison Rape Cases

Pleading and establishing deliberate indifference in the prison context poses additional challenges. While the Prison Reform Enforcement Act ("PREA") addresses rape in prisons, PREA does not provide for a private cause of action. Rather, victims of prison rape generally seek justice by filing suit pursuant to 42 U.S.C. §1983, alleging that they have been deprived of their right to bodily privacy[xxiii] and to equal protection, as secured by the Fourteenth Amendment, and/or that they have been subject to cruel and unusual punishment as prohibited by the Eighth Amendment.

The initial barrier to addressing these claims is clear – the individual is a prisoner, and as such, any allegations regarding internal wrongful conduct towards that person is reviewed with

suspicion. Reaching counsel who will entertain these claims, being able to secure needed medical attention, and fearing retribution all serve as barriers to prison rape claims.

Once the prisoner has moved past the fear of reporting, and has been able to move forward with filing a suit, the victim must show that the prison official acted with deliberate indifference. In defining deliberate indifference in the prison context, the U.S. Supreme Court held that:

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; *the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference*. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added).

A prison official's *severe* or *repetitive* sexual abuse of an inmate is a violation of the Eighth Amendment. *Boxer X v. Harris*, 437 F. 3d 1107, 111 (11th Cir 2006); *Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015). While this seems clear, and while a prison official's sexual assault of an inmate *cannot, by definition, be consensual*, as it is a violation of state laws nationally, some courts have refused to address the issue of liability where qualified immunity has been advanced as a defense, as detailed below, or even where the Court has determined that the prison inmate acted voluntarily (as was the case in *Phillips v. Bird*, Civil Action No. 03-247-KAJ, 2003 U.S. Dist. LEXIS 22418 (D. Del. Dec. 1, 2003)).

See D.S. v. County of Montgomery, 286 Fed. Appx. 629 (11th Cir. 2008) (finding officers entitled to qualified immunity as to 42 U.S.C. §1983 claims, as failing to render assistance to a 15-year old prisoner who was raped did not rise to the level of deliberate indifference; but finding that as the officers did not have the discretion to leave the prisoner

unattended, they were not entitled to state agent immunity); *Buckley v. Dall. Cty.*, Civil Action No. 3:97-CV-1649-BC, 2000 U.S. Dist. LEXIS 5543 (N.D. Tex. Apr. 27, 2000) (dismissing complaint, and finding that officers were entitled to qualified immunity since plaintiff prisoner only alleged one incident of sexual assault).

Public College and University Immunity & Title IX Challenges[xxiv]

Victims of sexual assault on college campuses face similar immunity issues, as identified above, in seeking justice.

One in five college students experiences sexual assault in their college career.[xxv]

"More than 40 percent of U.S colleges and universities have not conducted a single sexual assault investigation in the past five years."[xxvi] As of November of 2016, the Office of Civil Rights of the Justice Department has 216 open investigations involving sexual assaults on college campuses[xxvii]. While sexual assaults on campuses are prevalent, many victims remain silent out of fear of being ignored by university administrators, forced out of the university or college, ostracized by peers, or subject to physical retribution. Victims often fear the real risk of being forced to face their accusers on the campus as a "student found to have likely committed a sexual assault is only expelled from school in fewer than one-third of cases".[xxviii]

The survival of 42 U.S.C. §1983 theories of liability which are often asserted in the context of a sexual assault case in a school environment including, but not limited to, violation of a student's constitutional right to bodily integrity, violation of Title IX of the United States Educational Amendments of 1972[xxix] ("Title IX") (where the school receives federal funding),

the state created doctrine (where a third-party is involved), and the special relationship doctrine,[xxx] will inevitably face challenges based on qualified immunity.

The difficulty in establishing deliberate indifference in defeating qualified immunity defenses is similar in cases involving educational institutions that receive public funds as in the other matters discussed above.

See Doe v. Sch. Bd., 604 F.3d 1248 (11th Cir. 2010) (where court held that 42 U.S.C. §1983 Title IX claim was properly dismissed where principal did not have final policymaking authority); *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015) (summary judgment granted to educational board where a teacher assistant's "rape bait" scheme caused a student to be raped (although the school knew that the perpetrator had numerous instances of sexual harassment and assault of other female minors) as the scheme was not a known or obvious consequence of a "catch in the act" policy or the board's inadequate training policies; but denying summary to the principal where evidence could have supported a finding that the principal acting with deliberate indifference to the plaintiff's rape); *Sherman ex rel. v. Helms*, 80 F. Supp. 2d 1365 (M.D. Ga., 2000) (where the court found that qualified immunity defeated state and 42 U.S.C. §1983 claims against school officials where a middle school student was raped by a janitor with a history of inappropriate behavior).

Title IX liability also turns, in addition to surviving immunity defenses, on whether discrimination is so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Williams v. Bd. Of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007). The gross injustice of the application of the interpretation of this

requirement can be seen in the matter of *L.L. v. Tuscaloosa City Bd. Of Education*, 2013 U.S. Dist. Lexis 5591, at *16-17 (N.D. Ala., January 15, 2013), where the Eleventh Circuit held that the mentally challenged plaintiff who was sexually assaulted by another student, did not suffer an injury so objectively offensive because she was able to return to school. *See also Worthington v. Elmore County Bd. Of Education*, 160 Fed. Appx. 877 (11th Cir. 2005) (court held that the defendant bus driver was entitled to qualified immunity where the defendant bus driver allowed an emotionally challenged minor to be sexually assaulted on a school bus, as the driver was exercising judgment in the discharge of duties imposed by statute or regulation in educating students).

VII. Coverage Challenges

While an insurance policy that excludes coverage for abuse or molestation, the "criminal act" and/or or "intentional injury" will be honored by the majority of courts, some courts have (1) found coverage where non-sexual acts such as kidnapping, and assault and battery, caused damage to the claimants that was distinct from the excluded conduct; and (2) chosen to narrowly construe sexual exclusion clauses.

In *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317 (11th Cir. 2005), the victim and her three-year old daughter were abducted in a church parking lot and were sexually assaulted. The court held that while the church's primary liability insurance policy included a sexual misconduct exclusion and separate sexual misconduct liability coverage, the incident encompassed more than one occurrence (to wit, the rape of one victim, the kidnapping,

the robbery and the assault), and as the incident involved more than one occurrence under Florida law, the commercial general liability ("CGL") policy's aggregate limit applied.

In so finding, the Eleventh Circuit referred to a decision of the Colorado Supreme Court in *Bohrer v. Church Mutual Ins. Co.*, 965 P.2d 1258 (Colo. 1998), where the Eleventh Circuit stated that the Colorado Supreme Court:

> held that damages arising from sex during counseling sessions by a minister were excluded by a sexual misconduct exclusion, even though the policy covered counseling activities. The court reasoned that the counseling and the sexual misconduct were inseparably intertwined because they occurred at the same time and in the same place. However, injuries caused by counseling activities where sex did not occur were not excluded because those activities were separable in time and space. The court found that because the counseling relationship predated and continued for a period of time prior to the sexual conduct, and contributed to her emotional and physical distress, the causes were separable. Id. at 1261. "Had no sexual contact taken place, [the victim] could have had a viable claim against [the minister] for breach of fiduciary based solely on counseling activities for which the coverage of this policy is answerable." Id. at 1263. *Guideone Elite* at 1329 (11th Cir. 2005).

See also W. World Ins. Co. v. Resurrection Catholic Mission of the S., Inc., Civil Action No. 2:05cv327-ID (WO), 2006 U.S. Dist. LEXIS 51119 (M.D. Ala. July 25, 2006) (CGL exclusion denying coverage for injuries "arising from sexual action" precluded coverage for rape-related injuries to an elderly nursing home patient but not for battery-related injuries, so the insurer had a duty to defend. The Court did not address the duty to indemnify); *See also Newby v. Jefferson Parish Sch. Bd.,* 738 So. 2d 93 (La. App. 1999) (holding consensual sex did not constitute sexual molestation for purposes of exclusion).

Certain courts have also narrowly interpreted sexual molestation exclusions. *See Thomas v. Maine Bonding & Cas. Co,* 2003 Me. Super. Lexis 48 (Me. Super Ct. Feb 28, 2003) (exclusion

was not applicable where there was no physical contact between the abuser and the minor he photographed nude); *St. Paul Fire & Marine Ins. Co. v. Schrum*, 149 F.3d 878 (8th Cir. 1998) (exclusion was not applicable to a claim of negligent supervision of children leading to the sexual abuse by a third party); *Georgia Baptist Children's Homes & Family Ministries v. Essex, Ins. Co.*, 207 Ga. App. 346 (Ga. Ct. App. 1993) (court found exclusion ambiguous where child was sexually assaulted by other child residents of the home); *Potomac Residence Club v. Western World Ins. Co.*, 711 A.2d 1228 (D.C. 1998) (exclusion didn't bar negligent hiring and supervision claims where unauthorized trips to restaurants and bars were not necessarily sexual); *New London County Mut. Ins. Co. v. Lyon*, 2011 Conn. Super. Lexis 783 (Conn. Super. Ct. 2011); *Pac. Ins. Co. v. Catholic Bishop of Spokane*, 450 F. Supp. 2d 1186 (E.D. Wash. 2006) (insurer's summary judgment motion denied where Plaintiffs alleged that the Diocese failed to supervise a priest who molested minors).

See also *Watkins Glen Cent. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 286 A.D.2d 48, 732 N.Y.S.2d 70 (N.Y. App. Div. 2001) (finding that the insurer owed a duty to defend and indemnify the school district where a teacher was convicted of sexually assaulting students, and the defendant school district failed to investigate allegations, and failed to conduct a sufficient background check).

While the majority of policies will probably contain exclusion provisions that will be enforceable, it is imperative that all policies be reviewed carefully to determine (1) if there is a basis to challenge any exclusions as vague, illusory, and/or not applicable; and (2) to confirm that there are exclusions that prohibit coverage.

VIII. Discovery Challenges

Invasion of Privacy as a Barrier to Prior Sexual Acts

Often, sexual predators are repeat offenders.[xxxi] The ability to determine the prior sexual history of a defendant in the majority of sexual assault cases is a crucial matter. In our own experience, we have been prevented from obtaining relevant prior sexual history information by a defendant who challenged said discovery request as violative of his right to privacy. In many jurisdictions, the ability to obtain this sort of information turns on (1) whether the party seeking to prevent disclosure has a legitimate expectation that the information will not be disclosed; (2) whether the state interest in facilitating the truth-seeking process through litigation is sufficiently compelling to overcome the asserted privacy interests; and (3) whether disclosure can occur in a less intrusive manner.

As noted by the Middle District of Alabama:

> The liberal discovery rules, however, do not automatically signify liberal dissemination of acquired discovery. "In order to preserve the confidentiality of sensitive materials, a district court may regulate access to the information by issuing a protective order pursuant to Rule 26(c)." *In re Alexander Grant & Co. Litig.,* 820 F.2d 352, 355 (11th Cir. 1987) (citing Fed. R. Civ. P. 26(c)). While Rule 26(c) "contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 35 n.21, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). The Rule 26(c) standard is "good cause," Fed. R. Civ. P. 26(c), but "courts have superimposed a somewhat more demanding balancing of interests approach to the Rule," *Farnsworth v. Procter & Gamble Co.,* 758 F.2d 1545, 1547 (11th Cir. 1985). One of those interests is the "'the countervailing public interest which [is] sacrificed by [protective] orders.'" *Shingara v. Skiles,* 420 F.3d 301, 308 (3d Cir. 2005) (quoting *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 785 (3d Cir. 1994)).

Hope for Families & Cnty. Serv. v. Warren, No. 3:06-CV-1113-WKW [WO], 2009 U.S. Dist. LEXIS 5253, at *14-15 (M.D. Ala. Jan. 26, 2009).

See also Williams v. District Court, 866 P.2d 908, 909 (Colo. 1993) (where the court held that although the interrogatories concerning the employee's prior sexual history was relevant to his damage claim, the need for the information should have been balanced against the privacy interests of the employee and others not before the court); *A.W. v. I.B. Corp.*, 224 F.R.D. 20 (D. Me. 2004).

IX. The True Challenge – Rape Myths

As noted in *Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis*[xxxii]:

> Notably, research has demonstrated that these types of negative attitudes toward rape victims (i.e., blame and responsibility attributions and rape minimization) appear to increase the further victims deviate from individuals' prejudicial perceptions of what a "real" rape victim is. This "real" rape victim stereotypically is a nonintoxicated woman who was suddenly and violently raped by a stranger in a deserted public place, sustained obvious physical injuries and apparent emotional distress, and immediately reported the crime to the police, providing clear evidence of the attack and of her active resistance to it (e.g., Maier, 2008; Williams, 1984). Thus, for example, victims of acquaintance rape are viewed more negatively than victims of stranger rape…

Wide-spread views of a "true" rape victim lurk in the minds of judges and juries alike, and make presenting the realities of rape, and the necessity of finding liability problematic. Any deviance in the allegations, or any perceived "culpable" conduct by the victim – *i.e.*, being intoxicated, being on a date, dressing provocatively – all indicate to many that the *complainant* must be fabricating the allegation. The reality of the existence of these myths in the minds of the

fact finders must be communicated earlier on to the victims to ensure their ability to survive the realities of litigation. It must also play a central role in the development of the litigation strategy.

X. Conclusion

In 2008 the United Nations Security Council adopted Resolution 1820, noting that "rape and other forms of sexual violence can constitute war crimes, crimes against humanity, or a constitutive act with respect to genocide". Rape is a means of robbing an individual of their personhood, of shaming, humiliating and attempting to destroy the individual. It is a crime in our penal code and is actionable civilly.

The prevalence of rape and sexual assault in our society must be addressed aggressively. As Plaintiffs lawyers we hold defendants accountable in the way that affects them most – by placing the shame where it belongs.

Endnotes

[i]Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2014 (2015).

[ii]Our firm also represents victims of human trafficking. The lawsuit not only includes counts against the trafficker, but also against those who have allegedly financially benefitted from the trafficking scheme including a motel and the website www.backpage.com. A United States Senate report recently released concluded that www.backpage.com knowingly facilitated sex trafficking. The full report is available at www.hsgac.senate.gov/subcommittees/investigations/reports.

[iii]Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2014 (2015).

[iv]United States Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. Child Maltreatment Survey, 2012 (2013)

[v]Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-2012 (2013).

[vi]National Institute of Justice & Centers for Disease Control & Prevention, Prevalence, Incidence and Consequences of Violence Against Women Survey (1998).

[vii]http://www.unh.edu/ccrc/about/index.html.

[viii] Mariner, Joanne (2001)*, "No Escape – Male Rape in U.S. Prisons"; Human Rights Watch. pp. I. Summary and Recommendations. Retrieved 2007-11-30.*

[ix]Beck, Allen J.; et al. (2013). *"Sexual Victimization in Prisons and Jails Reported by Inmates" (PDF). US Department of Justice. p. 6. Retrieved 2013-05-17.*

[x]David Finkelhor et al., *Sexually Assaulted Children: National Estimates and Characteristics*, NISMART BULL. (U.S. Dep't of Justice/ Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), Aug. 2008, at 1, 2.

[xi]Raeder, Myrna, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony,* Widener Law Review, Vol. 16:239 (2010).

[xii]*Id., citing Commonwealth v. Delbridge*, 855 A,2d 27, 34-36 (Pa. 2003).

[xiii]http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx.

[xiv]*Id.*

[xv]http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx.

[xvi]*Id.*

[xvii]*Id.*

[xviii]§6-2-38, Alabama Code, 1975.

[xix]A *Bivens* action is a claim for damages against individual federal officials for violation of constitutional rights where no other remedy is available. *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1257-98 (9th Cir. 2008). The Supreme Court has declined to extend *Bivens* remedies from individuals to federal agencies. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

[xx]Prior to the commencement of a FTCA claim in a district court, a claim must be presented to the federal agency within two years of the claim, and the plaintiff must exhaust the administrative procedures.

[xxi]As the majority of sexual assault claims are filed as state based assault and battery claims, except in jurisdictions where there are specific civil causes of action for sexual assault and/or rape.

[xxii]http://blogs.findlaw.com/dc_circuit/2014/07/no-bivens-liability-for-military-in-womens-sexual-assault-case.html.

[xxiii]Courts recognize a prisoner's constitutional right to bodily privacy under the liberty component of the 14th Amendment. *Bonner v. Chambers Cty.*, No. 3:04-cv-01229-WKW, 2007 U.S. Dist. LEXIS 54550, at *33 (M.D. Ala. July 26, 2007).

[xxiv]Luckily, courts typically find that students at private universities and colleges do not enjoy the same immunities as state based universities and colleges. *Andela v. Univ. of Miami*, 692 F. Supp. 2d 1356 (S.D. Fla. 2010) (*dicta* providing that only in rare circumstances can a private party be viewed as a state actor for 1983 purposes, *citing Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 1982)).

[xxv]The White House Task Force to Protect Students from Sexual Assault, First Report (April 2014).

[xxvi]http://www.thedailybeast.com/articles/2014/07/09/40-of-colleges-haven-t-investigated-a-single-sexual-assault.html.

[xxvii]https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault.

[xxviii]http://www.huffingtonpost.com/entry/sexual-assaultexplainer_us_5759aa2fe4b0ced23ca74f12.

[xxix]Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance".

[xxx]In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Supreme Court held that absent a "special relationship" the plaintiff could not bring suit against a government agency for private violence not attributable to their conduct. The Court defined the special relationship as where the State learns that the specific child is in danger of abuse from third parties, and fails to protect that child. *Id.* at 194.

[xxxi]Lisak, David Miller, Paul M., *Repeat Rape and Multiple Offending Among Undetected Rapists*, Violence and Victims, Volume 17, Number 1, 2002, pp. 73-84(12) (2014).

[xxxii]Hockett, Jericho M.; Smith, Sara J.; Klausing, Cathleen D.; Saucier, Donald A., *Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis*, Violence Against Women, Vol. 22(2) 139-167 (2016).