NOTES

CIVIL REMEDIES IN ACQUAINTANCE RAPE CASES

I. INTRODUCTION

He was a dentist, a leader in the community, and a family friend. He volunteered to drive her husband to the airport; she went along for the ride. After they dropped off her husband, he pulled into an alley, climbed into the back seat, held a knife to her throat, and raped her.[1]

They were freshman roommates and football teammates. She came back from a party late one night with a friend and the two football players. The four of them chatted for a while. One of them left with her friend. The other one raped her. When his roommate returned, they took turns sexually assaulting her.[2]

Neither of these women reported the assault to the police.[3] Both chose to seek justice through the civil court system instead. The first woman successfully sued the man who raped her in civil court. The other one filed a lawsuit.

This Note discusses the possibilities for litigating acquaintance rape cases in the civil courts. It is particularly concerned with the problem of under-reporting of acquaintance rape, and it explores the possibility that civil suits might encourage more victims to come forward. It discusses the practical realities of civil litigation in comparison with criminal prosecution and considers the larger social effects of the use of the civil courts as a forum for seeking justice in acquaintance rape cases. Part II of this Note defines acquaintance rape and discusses some of the reasons why it is under-reported. Part III contains a brief overview of the reasons for exploring civil litigation. Part IV involves a detailed discussion of the mechanics of civil suits and the procedural advantages and disadvantages of using such suits in rape cases. Finally, Part V consists of a policy argument against the use of civil litigation in rape cases.

---

[1] These are the facts of Delia S. v. Torres, 184 Cal. Rptr. 787 (1982).

[2] These are the facts alleged by Christy Brzonkala in her suit against her attackers and Virginia Polytechnic & State University. *See* Brzonkala v. Virginia Polytechnic & State Univ., No. 95-1358-R, 65 U.S.L.W. 2085, 1996 WL 431097 (W.D. Va. July 26, 1996); *see also* Nina Bernstein, *Civil Rights Lawsuit in Rape Case Challenges Integrity of Campus*, N.Y. TIMES, Feb. 11, 1996 at A1, A30.

[3] Brzonkala did attempt to seek justice through her university's internal disciplinary system. *See Brzonkala*, 1996 WL 431097 at 2. *See also* Bernstein, *supra* note 2. The university acquitted one man and ultimately sentenced the other to a "one-hour educational session." *Id.* at A30.

II. ACQUAINTANCE RAPE: BACKGROUND

A. *Stranger, Date and Acquaintance Rape*

While the exact formula varies from jurisdiction to jurisdiction, the basic elements of a rape charge are: 1) sexual activity occurred; 2) the victim did not consent; 3) the attacker used force or the threat of force to secure the victim's compliance; and 4) the attacker intended to rape the victim (that is, he was or should have been aware of the victim's lack of consent).[4] Traditionally, the law did not distinguish between rapes in which the attacker and victim did not know each other and rapes in which they were acquainted.[5] In reality, however, rapes involving strangers have always been treated differently than those involving acquaintances.[6] Stranger rapes have higher rates of reporting and prosecution than acquaintance rapes.[7] In addition, the question of consent is less likely to be at issue in a stranger rape.[8] In general, victims of stranger rape are simply more likely to be believed and sympathized with, than victims of acquaintance rape.[9]

The terms "date rape" and "acquaintance rape," which are often used interchangeably, actually have slightly different connotations. "Acquaintance rape" refers to any rape where the victim and attacker knew each other prior to the assault. They may have been relatives, close friends, classmates, co-workers, or merely casual acquaintances.[10] "Date rape," a subset of acquaintance rape, suggests that the victim and attacker were either involved in an ongoing romantic

---

[4] *See* Karen M. Kramer, Note, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 125 (1994). For the purposes of this Note, rape victims will be referred to as "she" and attackers as "he." This does not mean that homosexual and female-on-male rapes do not occur. See Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 127-28 nn.10-13 (1994) for a list of articles about homosexual and female-on-male rape. However, due in large part to sexist assumptions that women's bodies are men's for the taking, most rapes involve a male attacker and a female victim. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

[5] *See* SUSAN ESTRICH, REAL RAPE 4 (1987).

[6] *See id.* at 4-5.

[7] *See id.* at 3-4.

[8] It seems axiomatic that the majority of women are unlikely to consent to sex with a complete stranger. Of course, some stranger-rape defendants do attempt a consent defense. *See generally* Commonwealth v. Gouveia, 358 N.E.2d 1001 (Mass. 1976).

[9] ESTRICH, *supra* note 5. Again, this is hardly true of all stranger-rape cases. *See, e.g.*, Theresa L. Lennon et al, *Is Clothing Probative of Attitude or Intent? Implications for Rape and Sexual Harassment Cases*, 11 LAW & INEQ. J. 391 (1993) (discussing in detail a notorious Florida case where a jury acquitted a stranger-rape defendant of sexual assault and kidnapping on the grounds that the victim's provocative attire indicated that "she asked for it").

[10] A problem with this definition is determining when two people graduate from being strangers to being acquaintances. For instance, is the woman who is raped an hour after meeting her assailant a victim of stranger or acquaintance rape?

relationship[11] or considering starting one. This Note addresses the entire category of acquaintance rape, including date rape.[12]

B. *Problems Associated with the Reporting of Acquaintance Rapes*

1. Rape Trauma Syndrome and Related Psychological Problems

Rape trauma syndrome is an umbrella term which describes the psychological reactions of a rape victim in the period following the attack.[13] In addition to the anxiety and depression normally associated with trauma,[14] rape victims tend to blame themselves for the attack.[15] Often the victim feels that the attack was somehow "her fault," blaming herself for accepting a ride, for example, or for allowing him into her apartment. These sensations of fault are often reinforced by the tendency of others to blame the victim for somehow inviting the rape.[16] Rape victims commonly suffer from nightmares or develop phobias about people or places associated with the attack.[17] Following an attack, many rape victims

---

[11] Some commentators include marital rape in this category. The law has traditionally assumed that a married man cannot rape his own wife. *See, e.g.*, MODEL PENAL CODE § 213.1 (1985) (stating that "a man who has sexual intercourse with a female not his wife is guilty of rape . . . "). In recent years, many commentators have argued for the abolition of the spousal exemption because it is based on the outdated theory that a married woman's body is the absolute property of her husband. *See* ESTRICH, *supra* note 5, at 72-79.

[12] Date rapes commonly involve the situation in which sexual activity starts out as consensual, but one party tries to stop it before it goes "too far." This concept of rape gave rise to the infamous Antioch rules of student conduct (which directed participants in sexual activity to clearly ask for and receive permission from their partners before embarking on each escalation of activity). This is also the concept relied upon by commentators who complain that modern feminism's focus on rape is based on outdated notions of chaste, innocent women and sexually predatory men. *See generally* KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS (1993). While this situation may be fairly common, it hardly begins to describe all the possible circumstances which may lead to rape.

[13] *See* Andrea Parrot, MEDICAL COMMUNITY'S RESPONSE TO ACQUAINTANCE RAPE - RECOMMENDATIONS, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 270, 273 (Andrea Parrot & Laurie Bechhofer, eds., 1991). Rape trauma syndrome is a form of post-traumatic stress disorder. *Id.*

[14] *See id.* at 274.

[15] *See id.* at 279.

[16] *See id.* One woman's family shut her out completely after she told them about her rape: "No one wants to have anything to do with me. My grandmother . . . says it is a shame on the family . . . [e]ven my husband is ashamed of me; [he] doesn't want me around his family. It is as though it were my fault." HELEN BENEDICT, RECOVERY: HOW TO SURVIVE SEXUAL ASSAULT FOR WOMEN, MEN, TEENAGERS, THEIR FRIENDS AND FAMILIES 32 (1985). Another victim's therapist told her "that I was self-destructive and that the rape was part of that pattern . . . she made me think the whole thing was my fault." *Id.* at 67.

[17] *See id.* at 28.

struggle to hold their psyches together[18] and are incapable of or unwilling to immediately report the rape.

When the victim knows the assailant, the psychological damage associated with rape trauma syndrome takes on an added dimension. Acquaintance rape victims are more likely to blame themselves than women raped by strangers.[19] Acquaintance rapes involve an enormous violation of trust. An attack by someone that the victim knew, or thought she knew, may lead the victim to distrust her other friends and acquaintances,[20] and may make her wary of telling them what happened. Furthermore, a victim of acquaintance rape may be forced to continue to have contact with her attacker if, for example, the attacker is a coworker or classmate. A victim in these circumstances may feel that reporting the rape is not worth the disruption and possible retaliation that may result when the report becomes known.

An acquaintance rape victim's perception of how society views her may further dissuade her from reporting rape. The perception that women are quick to "cry rape" for illegitimate reasons such as vengeance, blackmail, or to cover up an illicit sexual relationship still persists.[21] A woman who was drinking, or who chose to be alone with her assailant, is often assumed to have "asked for it" and thus be unworthy of sympathy.[22] A victim may believe that if her attacker discovers that she reported the rape, he will begin a campaign to discredit her accusations, which may also destroy her reputation. An attacker may claim that she consented to sex, has ulterior motives in claiming rape, and is generally not to be trusted. In short, an acquaintance rape victim may feel that by reporting an assault, she has even more to lose than she could possibly gain through legal redress.

2. Legal Problems

The legal framework does little to encourage victims of acquaintance rape to come forward. The passage of so-called "rape shield laws"[23] in most states appears to have had minimal effect on the incidence of reported acquaintance rapes.[24] The rates of indictment or conviction have not risen significantly.[25] Po-

---

[18] *See id.* at 35. It may take several months before many women can fully experience rage at their attackers. *See id.* at 36. This time lag between the rape itself and the victim's ability to turn her anger outward no doubt contributes to the delays in reporting many acquaintance rapes.

[19] *See* Bonnie L. Katz, *The Psychological Impact of Stranger versus Nonstranger Rape on Victims' Recovery, in* ACQUAINTANCE RAPE, *supra* note 13, at 251, 259.

[20] *See* Christine A. Gidycz & Mary P. Koss, *The Effect of Acquaintance Rape on the Female Victim, in* ACQUAINTANCE RAPE, *supra* note 13, at 275-276.

[21] *See* JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 92-93 (1982).

[22] *See id. See also* Kramer, *supra* note 4, at 128-130.

[23] *See* discussion of rape shield laws *infra* notes 32-35 and accompanying text.

[24] *See* CASSUA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRSSSROOTS REVOLUTION AND ITS IMPACT (1992). Spohn and Horney tracked the incidence of acquaintance rape reporting in several jurisdictions both before and after the passage of rape shield

lice and prosecutors' emphasis on achieving high conviction rates may make them reluctant to investigate and prosecute "borderline" cases.[26] Acquaintance rapes, which rely heavily on the victim's testimony and relatively lightly on corroborating evidence, may often seem "borderline" and unworthy of serious attention.[27] Even a victim who reports an attack may find her complaint dismissed with minimal investigation.[28]

A victim whose case gets to the court system may have to deal with the aforementioned social perceptions of acquaintance rapes recast into legal form. The most common defense in acquaintance rape cases is that the victim consented.[29] The defense of consent rests on insinuations of ulterior motives.[30] Essentially, the defense attempts to show that the victim is lying, that she regrets her participation in activities that she regarded as consensual at the time, and that she is trying to preserve her reputation.[31]

Beginning in the late 1970s a rising tide of protest against the treatment of rape victims in court led to the passage of rape shield laws in most jurisdictions.[32] The typical rape shield law provides that evidence of an accuser's past sexual history is inadmissible as part of a rape defense.[33] The laws were de-

---

laws. The reforms had no impact in most jurisdictions. However, where the rates of reporting rose slightly, it seemed to be in response to publicity surrounding the reforms rather than the operation of the laws themselves. *See id.*

[25] *See id.*

[26] *See* MARSH, *supra* note 21, at 87-88.

[27] *See id.* at 89.

[28] Another disincentive to investigation is the doctrine of "fresh complaint." *See* MODEL PENAL CODE § 213.6(5)(Official Draft 1962). In the past, many jurisdictions refused to prosecute a rape complaint that was not "timely made." *See* ESTRICH, *supra* note 5, at 53-54. Even jurisdictions which have rejected the fresh complaint rule still routinely allow in evidence of prompt accusation on the assumption that it will strengthen the prosecution's case. *See* Commonwealth v. Licata, 591 N.E.2d 672, 674-675 (Mass. 1992). The cognate assumption is that a complaint that is not "fresh" is more likely to be disbelieved, and is therefore less worthy of investigation and prosecution. *See Licata*, 591 N.E.2d at 675.

[29] *See* Kramer, *supra* note 4, at 128. The other basic rape defenses are mistaken identity, incapacity, and denial that the attack occurred at all. *See id.* The incapacity defense is rare, and mistaken identity is unlikely to succeed where the victim and the assailant knew each other. *See id.* Some defendants attempt an "implied consent" defense, claiming that the victim acted in a way that the defendant justifiably assumed she welcomed sexual activity, even though she may not have actively consented. *See generally* Lennon, *supra* note 9, for a discussion of provocative clothing as an indication of implied consent.

[30] *See, e.g.*, Commonwealth v. Ascolillo, 541 N.E.2d 570 (Mass. 1989)(defendant suggested that accuser had sex with him in exchange for drugs).

[31] *See, e.g.*, Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991) (defendant claimed woman accused him of rape because she did not want her parents to think she had consensual premarital sex, and did not want her boyfriend to know she had cheated on him).

[32] *See* ESTRICH, *supra* note 5, at 80; *see also* SPOHN AND HORNEY, *supra* note 24.

[33] *See, e.g.*, MASS. GEN. LAWS ch. 233, § 21(b) (1995).

signed to encourage women to report rapes by barring a standard defense tactic. By bringing out the victim's sexual past, the defendant would try to infer that a sexually promiscuous, or simply sexually active, woman was likely to consent to sex with any man, and specifically consented to the disputed incident.[34] Rape shield laws remain controversial, and their application has been inconsistent.[35] However, even the limited protections afforded by these laws remain unavailable to victims who are unwilling to report the crimes at all.

III. ENCOURAGING REPORTING AMONG RAPE VICTIMS

A. *If the System Is So Untrustworthy, Why Ask Victims to Use It?*

It may seem paradoxical to suggest that rape victims should be more strongly encouraged to report the crimes against them when the legal system which prosecutes those crimes is so deeply flawed. Yet the under-reporting of acquaintance rapes may be precisely the reason that it has been ignored by the law. As long as acquaintance rapes are perceived as uncommon occurrences, there is little reason for courts, legislatures or society to address the issue, question their attitudes, or demand reform. On the other hand, rapes which are reported and brought to trial can easily turn into media circuses, where discourse tends to slide away from the central issue of the victim's pain in favor of almost any other subject.[36] If more women report acquaintance rape, more investigations,

---

[34] *See* ESTRICH, *supra* note 5, at 47-49. Most rape shield laws allow the defendant to present evidence of his past sexual relationship with the victim, presumably on the theory that agreeing to sleep with a man once creates an inference that one will consent to sex with him again at any time in the future. *See id.* at 49. As one commentator sharply put it,

> "if she ever said yes once—
> yes once on a date,
> yes once three years ago,
> yes once just once:
> a yes to any penis is permanent . . . ."

JOHN STOLTENBERG, REFUSING TO BE A MAN 178 (1989).

[35] *See generally* SPOHN AND HORNEY, *supra* note 24; MARSH, *supra* note 21 for a fuller discussion about the application of rape shield laws and the controversy surrounding them.

[36] For example, the William Kennedy Smith rape trial turned into a media circus when a tabloid newspaper published the victim's name; the New York Times then printed an incredibly unflattering profile of the victim, Patricia Bowman. *See* Fox Butterfield with Mary B.W. Tabor, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance*, N.Y. TIMES, Apr. 17, 1991, at A17 (noting, among other things, that Bowman had a child out of wedlock, "held jobs sporadically," and "had seventeen tickets for speeding, careless driving, or being involved in an accident;" sources described her as someone who "liked to drink and have fun with the ne'er do wells in cafe society" and "ha[ving] a little wild streak"). Coverage of the trial then turned into a heated debate about the propriety of revealing the names of rape victims in the press. *See, e.g.*, Roger Cohen, *Should*

prosecutions and convictions will inevitably result. The consequences of increased reporting have a significant impact. Men may learn to think twice before forcing themselves on women if it becomes clear that the law will hold them accountable for their conduct. Further, an influx of cases might raise public awareness about the particular problems concerning date and acquaintance rape, which could lead to further legal reform.

B. *The Role of Civil Penalties As An Incentive For Victims to Report Rape*

Civil compensation in acquaintance-rape cases is not a new concept. The lower burden of proof and the lesser protections extended to the defendant make civil actions an inviting alternative to criminal prosecutions for rape victims. The drawbacks include the considerable time and expense involved in civil proceedings, as well as the limited capacity of civil courts to punish offenders. Additionally, the overuse of the civil courts to resolve essentially criminal problems generates other problems. Shifting a significant number of cases away from the responsibility of the criminal courts removes the incentive for rape law reform. Labelling certain kinds of rapes as essentially "tortious," not criminal, trivializes them. It creates a two-tier system in which some rapes are "crimes" and thus more "legitimate" because they are tried in criminal court. Other rapes are considered "mere torts" because the cases are brought in civil court.

IV. MECHANICS OF CIVIL SUITS

A. *Causes of Action*

Plaintiffs in rape cases who choose a civil forum may assert a variety of potential causes of action. Basic common-law tort theories are always available. Federal statutes may also permit recovery. In some cases, a negligence theory could furnish a basis for recovery against a third party. The creation of new causes of action in the future also provides the possibility of recovery. Each of these theories is separately considered below.

1. Basic Tort Doctrines

Basic tort law is broad enough to encompass rape under several theories. The most obvious theories are assault and battery.[37] Some jurisdictions have actually

---

the Media Name the Accuser When the Crime Being Charged Is Rape?, N.Y. TIMES, Apr. 21, 1991, at E4; William Glaberson, *Times Article Naming Rape Accuser Ignites Debate of Journalistic Values*, N.Y. TIMES, Apr. 26, 1991, at A3. Similarly, many considered the Mike Tyson rape case to be more about race than rape (even though both the attacker and the victim were black). *See, e.g.*, Robert Wright, *He Never Had a Chance: Mike Tyson Was Sucker-Punched*, MINNEAPOLIS-ST. PAUL STAR-TRIBUNE, Apr. 14, 1995.

[37] *See* Terrio v. McDonough, 450 N.E.2d 190 (Mass. App. Ct. 1983), *review denied*, 453 N.E.2d 1231 (Mass. 1983); McDonough v. Hartford Fire Ins. Co., 453 N.E. 2d 1231 (Mass. 1983).

recognized a sexual assault and battery tort.[38] Another basic tort theory is intentional infliction of emotional distress.[39] Intentional infliction of emotional distress may be particularly appropriate in acquaintance rape cases because the attacker presumably abused his relationship with the victim by manipulating her into a situation where he could attack.[40] Rape victims can and have successfully used these theories to obtain civil judgments against their attackers.[41]

2. Statutory Causes of Action

In 1994, Congress passed the Violence Against Women Act[42] (the "Act") which included various provisions intended to protect rape victims.[43] The relevant provisions of the Act created a federal cause of action that allows victims to sue the perpetrator of a "crime of violence motivated by gender" based on a theory of deprivation of civil rights.[44] This cause of action differs from the conventional civil rights cause of action in that the defendant need not have acted under color of state law or as part of a conspiracy.[45] In such cases, courts are not limited by the traditional remedies of compensatory and punitive damages and injunctions, but may award "such other relief as a court may deem appropriate."[46] Furthermore, a rape victim may also sue her attacker on the theory that the rape stemmed from the defendant's hatred of women.[47]

However, it is problematic to construe the Act as applicable to rape cases. The Act defines "crime of violence" to include any "act . . . that would constitute a felony against the person," whether or not the act resulted in criminal

---

[38] *See, e.g., Terrio*, 450 N.E.2d 190.

[39] *See* Delia S. v. Torres, 184 Cal. Rptr. 787 (1982). In this case, the husband of the victim also managed to successfully sue the rapist for intentional infliction of emotional distress, a result later disapproved by the California Supreme Court. *See* Christensen v. Superior Court, 820 P.2d 181, 203-04 (Cal. 1991).

[40] *See Delia S.*, 184 Cal. Rptr. at 796. The court in this case expressly noted that the victim's emotional distress award did not arise from the rape itself, but from the defendant's abuse of his friendship with the victim and her husband, and the defendant's subsequent public accusations that the victim was lying. *Id.* at 482-3.

[41] *See generally* Holly J. Manley, Comment, *Civil Compensation for the Victim of Rape*, 7 COOLEY L. REV. 193 (1990).

[42] Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 13701 (1994).

[43] *See id.* The Act is also designed to protect women from domestic violence.

[44] 42 U.S.C. § 13981 (1994). The pertinent language reads: "All persons within the United States shall have the right to be free from crimes of violence motivated by gender . . . ." §13981 (b). "A person . . . who commits a crime of violence motivated by gender and thus deprives another of the (aforementioned) right . . . shall be liable to the party injured . . . ." §13981 (c).

[45] *See id.*; *compare* 42 U.S.C. §§ 1983 and 1985(3) (1994).

[46] *See* 42 U.S.C. § 13981(c). Since this is a civil cause of action, "other relief" presumably does not include imprisonment.

[47] *See* Wendy Rae Willis, Note, *The Gun is Always Pointed: Sexual Violence and Title III of The Violence Against Women Act*, 80 GEO. L.J. 2197 (1992).

charges.[48] In many states, recent rape law reforms instituted a system of degrees of rape, with "violent" rapes defined as more serious offenses than "nonviolent" rapes.[49] A rape considered of a lesser degree might not qualify as a "felony" and thus may not be actionable under the Act.[50] This is particularly problematic when dealing with acquaintance rapes, which are less likely to involve weapons or severe physical violence and so are less likely to satisfy the definition of "felony."[51] An acquaintance rape victim who fails to meet her state's standard for felony rape might thus find herself unprotected by the Act.

The Act's requirement that the defendant be "motivated by gender"[52] is also cause for concern. The Act defines "crimes of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[53] The Act specifically provides that the victim must prove by a preponderance of the evidence that the attack was motivated by gender.[54] Under this evidentiary standard, a plaintiff might be forced to present additional evidence that her attacker was motivated by his hatred for women.[55] Unless the rapist made his sexist motivation obvious by, for example, shouting misogynist slurs during the crime, it is difficult to imagine the kind of evidence that would meet that standard.[56] Many scholars would suggest that all rapes are by definition motivated by an animus towards women, violently expressing the subordinate position of women in society and the general assumption by men that they are entitled to sexual dominion over women.[57] Since the Act does not contain language to that effect, courts may freely impose the higher standard of specific motivation, and many will probably do so. A victim's inability to prove that her attacker was actually motivated by hatred of women could render her ineligible for protection under the Act.

In a recent case, a college student nevertheless attempted to invoke the Act's protection in an acquaintance rape situation.[58] The plaintiff, Christy Brzonkala,

---

[48] *See* 42 U.S.C. § 13981(d)(2)(A).

[49] *See* David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER. & L. 163, 226-227 (1993).

[50] *See id.*

[51] *See generally* SPOHN AND HORNEY, *supra* note 24.

[52] *See* 42 U.S.C. § 13981(c).

[53] *Id.* § 13981(d)(1).

[54] *See id.* at § 13981 (d)(1).

[55] *See* Willis, *supra* note 47, at 2205-2206.

[56] *See* Frazee, *supra* note 49, at 209. Frazee makes the further point that the statute places lesbians and women of color at a disadvantage since they must specifically prove that the rape was motivated by the fact that they were female and not by the attacker's disdain of their other group affiliations. *See id.* at 213-219.

[57] *See, e.g., id.* at 190; Willis, *supra* note 47, at 2206; *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171 (1989).

[58] *See* Brzonkala v. Virginia Polytechnic & State Univ., No. 95-1358-R, U.S.L.W. 2085, 1996 WL 431097 (W.D. Va. July 26, 1996); *See also* Bernstein, *supra* note 2.

claimed that two football players raped her. She sued both the players and the university, the latter on the grounds that its internal disciplinary system failed to protect her.[59] The case thus included an element of institutional bias along with the claim of the rapists' own bias. The plaintiff, however, failed in her attempt to invoke the Act's protections. The district court found that the plaintiff stated a claim for relief under the Violence Against Women Act, but declared the Act itself unconstitutional.[60] The United States Department of Justice filed an appeal with the United States Court of Appeals for the Fourth Circuit on Brzonkala's behalf,[61] and the question of the constitutionality of the Act is likely to reach the Supreme Court of the United States.[62]

Title VII of the Civil Rights Act of 1964[63] (the Federal Employment Rights Act) could also permit recovery for acquaintance rape victims in certain situations. The Supreme Court has held that workplace sexual harassment is illegal and actionable under the Act.[64] The case that established that precedent, *Meritor Savings Bank FSB v. Vinson*,[65] featured a set of facts that essentially described a form of acquaintance rape.[66] The Court's standard for determining whether the sexual activity constituted harassment focused on whether the activity was unwelcome on the part of the plaintiff as opposed to whether it was "voluntary" in the sense of a lack of physical force.[67] In essence, the plaintiff in *Meritor* used the Title VII anti-discrimination provisions as a means of creating a civil action for acquaintance rape.[68] Title VII however, applies only to rapes commit-

---

[59] *See* Bernstein, *supra* note 2. The university cleared one defendant completely when a teammate testified that he had an alibi, and sentenced the other to a one-year suspension, which was later reduced to a "one-hour educational session." *Id.* Christy Brzonkala, the plaintiff, claimed that the university showed bias in letting the defendants off lightly so as to benefit the all-male football team. *See id. See* discussion of third-party defendants *infra* Part IV.A.3.

[60] *See Brzonkala.* The court held that the Act came under neither the Commerce Clause nor the Fourteenth Amendment and thus involved an impermissible exercise of Congressional authority. *See id.*

[61] *See* Peter Hardin, *The Department of Justice Said Yesterday It Will*, RICHMOND TIMES-DISPATCH, Sept. 19, 1996, at B3.

[62] A Connecticut District Court recently upheld the constitutionality of the Violence Against Women Act. *See* Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). In that case, a woman successfully sued her abusive husband under the Act. *See id.*

[63] *See* 42 U.S.C. §§ 2000e-2000e-17 (amended 1991).

[64] *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[65] *Id.*

[66] The defendant was the plaintiff's supervisor at work. *See id.* According to the plaintiff, the defendant pressured her into having sex with him by threatening her with dismissal. *See id.* The Court also noted that the defendant "forcibly raped her on several occasions." *Id.* at 60.

[67] *See id.* at 68.

[68] One commentator interprets the *Meritor* decision as follows: sexual harassment is a form of sex discrimination and rape is a form of sexual harassment; therefore, rape is a form of sex discrimination under Title VII, and employers are liable for the rapes com-

ted by a co-worker or superior, thus limiting its usefulness as a vehicle of recovery. Another drawback is that courts usually grant Title VII judgments against the employer, not against the employee who engaged in the offensive conduct. In that sense, Title VII recovery, although mandated by statute, is essentially a system of third-party liability.

3. Third-Party Liability

Third-party liability provides another possible way to effect recovery in acquaintance-rape cases. This is a fairly common strategy in rape cases, and has been used successfully many times.[69] The plaintiff must prove that the third party negligently created the conditions which led to the rape.[70] While third-party liability may encourage institutions to make their facilities safe for women,[71] it will not be helpful in many acquaintance-rape cases. The obvious drawback is that the victim who voluntarily placed herself in the company of the defendant has no negligence claim. The victim whose attacker broke into her apartment may have a claim against her landlord, but one who invited her attacker over for dinner does not. The only acquaintance rapes covered by third-party liability would be those where the attacker who broke into the woman's apartment happened to know the victim.[72]

---

mitted by their employees. *See* Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 55 (1991). Steinberg then demonstrates how Title IX could provide a similar cause of action for students who are raped by men employed by the university. *See id.* at 56-58.

[69] *See, e.g.*, Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210 (E.D.N.Y. 1976) (rapist broke into the victim's motel room through sliding glass doors; the victim, the singer Connie Francis, won a $2.5 million judgment against the motel); Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So.2d 70 (La. App. 1989) (mother of minor rape victim brought suit against rapists and amusement park where the rape occurred; the court found park 10% at fault and awarded the victim a total of $180,000); Alphonso v. Charity Hosp., 413 So.2d 982 (La. App. 1982) (attacker raped mental patient twice in hospital; $50,000 judgment against hospital); Miller v. State, 467 N.E.2d 493 (N.Y. 1984) (student sued state-run university after man broke into her dorm and raped her); Skaria v. State, 442 N.Y.S. 838 (N.Y. Ct. Claims 1981) (attacker broke into state-owned apartment building through improperly locked door and raped tenant; she and her husband sued state in its capacity as her landlord and recovered a total of $87,500).

[70] *See* cases cited at *supra* note 69. As noted above, third-party liability may also be possible under a civil rights theory of institutional bias. *See supra* note 59.

[71] Third party liability provides women confronted with an indigent defendant with a way to satisfy the judgment. *See* Manley, *supra* note 41, at 204. Many have criticized the "deep-pocket" phenomenon. *See id.* at 210.

[72] *See, e.g.*, Doe v. Linder Constr. Co., 845 S.W.2d 173 (Tenn. 1992). The defendant's employees had access to the keys to the plaintiff's house and raped her. She recognized the defendants from having seen them around the housing complex, so they could be considered "acquaintances" in the loosest sense of the word. *See supra* note 10.

Third-party liability also poses philosophical problems. Allowing civil recovery in rape cases encourages victims who are unable to get a satisfactory criminal verdict against their attackers to come forward. Entering a judgment against a third party has absolutely no deterrent or punitive effect on the rapist himself. If anything, it dilutes the blame, suggesting that the employer (or landlord or hotelier, and so forth) shares partial responsibility for the attacker's actions. While the attempt to find creative ways to compensate rape victims is commendable, the focus on the third party's negligence diverts attention away from the attacker who is responsible for the rape and who most deserves punishment. Third-party liability, therefore, is not particularly useful in achieving the goal of encouraging more victims to report the crimes against them.[73]

4. Creating a New Cause of Action

Other causes of action are theoretically possible. For example, a legislature could create a statute authorizing a cause of action in rape cases using more specific language than that set forth in the Violence Against Women Act.[74] A federal statute could state that rape is *de facto* discrimination against women and therefore a compensable civil rights violation; it could also clarify that rape is an inherently violent act.[75] A state legislature could pass a similar statute based on state constitutional guarantees. Alternatively, a state legislature could simply pass a law stating that all forms of rape are civilly actionable, essentially making rape a tort.[76] Courts faced with a rape case brought under ordinary tort law could fashion a common-law doctrine of rape as an independent tort.

Although there are numerous possibilities, the prospects for rapid change are dim. Courts and legislatures remain heavily male-dominated and tend to respond slowly to the needs of women.[77] Concerns about the explosion of civil litigation will tend to dissuade legislatures from risking controversy by creating new civil causes of action.[78] Merely creating new causes of action, however, will not change the basic problems associated with the use of civil charges in rape cases.[79]

---

[73] For a different analysis of the implications of third-party liability, see Leslie Bender with Perette Lawrence, *Is Tort Law Male? Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993).

[74] *See* 42 U.S.C.A. § 13981 (West 1995).

[75] *See* Frazee, *supra* note 49, at 241-247, for a proposed rewriting of the Violence Against Women Act that accomplishes these goals.

[76] Other crimes, such as assault and battery, also sound in tort law.

[77] *See generally* MACKINNON, *supra* note 57, at 237-238.

[78] *See* Bernstein, *supra* note 2 (noting that opponents of the Violence Against Women Act claimed that it would "flood federal courts with new cases").

[79] *See* discussion *infra* Part V.

B. *Procedural Differences Between Civil and Criminal Rape Trials*

1. Standard of Proof

The standard of proof required in a criminal trial is the "beyond a reasonable doubt" standard; in most civil cases, the requirement is a "preponderance of the evidence" standard. The different standards of proof illustrate the advantage of civil proceedings from the point of view of the victim.[80] The majority of acquaintance rapes produce little or no physical evidence, particularly if there has been a delay in reporting.[81] Acquaintance rapes thus frequently boil down to a question of the rapist's word against the victim's.[82] A jury is presented with two relatively similar verbal accountings of the same event, except that in one version, the victim consented to sex, and in the other version, she did not. For the victim, it is much easier to meet the civil standard than to meet the criminal requirement of "beyond a reasonable doubt."[83]

2. Evidentiary Privileges and Protections

The defendant in a criminal trial has an absolute right[84] to refuse to answer questions that could be potentially incriminatory. A civil defendant, by contrast, is only protected to the extent that he may refuse to answer *criminally* inculpatory questions. He must take the stand if called upon, and the plaintiff's attorney is free to comment on the implications of the defendant's refusal to answer questions.[85] His Fifth Amendment privilege is thus not as extensive in the civil context.

---

[80] *See* Manley, *supra* note 41, at 199.

[81] *See* Frazee, *supra* note 49, at 228-229 (citing Lynn Hecht Schafran, Writing And Reading About Rape: A Primer, 66 ST. JOHN'S L. REV. 979, 987 (1993). A "mainstay of the myths and stereotypes about rape is that a 'true victim' is one who sustains serious physical injury").

[82] *See, e.g.*, Hunter v. Dist. Ct., 543 P.2d 1265 (1975) (The Colorado Supreme Court overruled trial judge's dismissal of information on rape and kidnapping charges where trial judge found that the testimony of the complaining witness had been contradicted in several material aspects. Therefore, the judge chose to disregard the testimony of the victim in its entirety, because he could not distinguish between fact and fiction in her testimony).

[83] Indeed, plaintiffs have won in civil court where the defendant had been acquitted of criminal charges. *See* Terrio v. McDonough, 450 N.E.2d 190 (Mass. App. Ct. 1983) (defendant acquitted of criminal rape); Delia S. v. Torres, 184 Cal. Rptr. 787 (1982) (no criminal complaint filed). The appellate court in the former case upheld the trial judge's refusal to admit evidence of the defendant's acquittal on the grounds that "the standards of proof and facts to be proved in a criminal case are likely to be sufficiently dissimilar from civil counterparts so that the result in one proceeding may have no probative value in another." *Terrio*, 450 N.E.2d at 197.

[84] A criminal defendant may be forced to perform various potentially incriminatory actions. However, the Fifth Amendment privilege still prohibits the defendant from being compelled to answer potentially incriminating questions.

[85] *See* Manley, *supra* note 41, at 199-200.

The implications of this are significant. If a civil defendant wishes to avoid testifying, he must invoke the Fifth Amendment while on the stand, whereas a criminal defendant has the right to refuse to even take the stand.[86] On the other hand, since the most common defense to acquaintance rape is consent, many defendants will wish to tell their side of the story even in a criminal proceeding.[87] The diminished protection of the Fifth Amendment privilege in the civil context, therefore, may work against the victim.

Another possible drawback to using the civil forum is the victim's loss of the protections provided by the rape shield laws.[88] Unless the state's statute specifies that rape shield protections apply in the civil context, the victim might lose even those meager safeguards. If the judge decides that the victim's sexual history is relevant, she may find her entire private life admitted into evidence. In short, the victim's status as a civil plaintiff rather than a criminal witness does not guarantee her kinder treatment by the court or the defense attorney.[89]

3. Monetary Costs of Civil Litigation

The state is financially responsible for the prosecution of criminal cases whereas civil litigants are responsible for the costs of their legal expenses. Most personal-injury attorneys receive part of any final settlement as a contingent fee, so the plaintiff need not necessarily be wealthy.[90] However, if the defendant is impoverished, it will be impossible to satisfy a monetary judgment against him.[91] At this point, the third-party institutional defendant becomes an attractive option because it is likely to carry insurance to pay for such judgments.[92] The problems with this option, as discussed earlier, are that institutions are not involved in every rape case and that such lawsuits tend to divert blame away from the rapist.[93]

---

[86] The Fifth Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment. United States v. Monia, 317 U.S. 424, 427 (1943). Absent a claim of the Fifth Amendment privilege, the duty to give testimony remains absolute. United States v. Mandujano, 425 U.S. 564 (1976).

[87] *See* FED. R. EVID. 412.

[88] *See* discussion of rape shield laws, *supra* Part II.

[89] *See* Carol Bohmer, *Acquaintance Rape and the Law*, *in* ACQUAINTANCE RAPE, *supra* note 13, at 317, 331.

[90] *See* LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 129 (1989).

[91] Some victims will sue simply for the satisfaction of receiving a judgment against the defendant, regardless of whether he is capable of satisfying it. *See* Manley, *supra* note 41, at 202.

[92] *See* MADIGAN & GAMBLE, *supra* note 90, at 127. Third-party suits are particularly likely to settle before trial because institutions prefer to minimize negative publicity. *See* Bohmer, *supra* note 89, at 331.

[93] *See* discussion *supra* Part IV.A.3.

C. *Conclusion*

The apparatus for bringing civil suits in acquaintance rape cases is clearly in place. Several causes of action are currently or potentially available. The advantages afforded by the lower standard of proof and lessened functioning of the Fifth Amendment are diminished by the loss of protection by rape-shield statutes and the defendant's potential inability to satisfy a judgment. The fact that successful civil litigation is possible in rape cases, however, does not necessarily mean that it is socially desirable.

V. AN ARGUMENT AGAINST THE USE OF CIVIL LITIGATION IN ACQUAINTANCE RAPE CASES

A. *Using Civil Courts to Handle Criminal Problems*

There is no bright line between crime and tort. Torts such as assault, battery, and fraud may also form the basis for criminal charges; conversion can function as a tort version of theft. Victims of crimes other than rape have sought relief from the civil courts when they felt that the criminal branch had failed them. The families of Nicole Brown Simpson and Ron Goldman, to name a current example, appear to have brought their civil wrongful-death suit against Orenthal James Simpson not so much for the money than for the satisfaction of seeing him held legally responsible for murder, albeit only in civil court.[94]

One possible problem with bringing criminal matters into the civil system is that it essentially announces that the criminal courts have failed to do their job properly. The plaintiffs in the Simpson suit, for example, explicitly based their case on the premise that the criminal court failed to convict a guilty man of murder.[95] At times, the criminal branch convicts the innocent and sets the guilty free; the courts are hardly infallible. The system should allow crime victims to turn to the civil courts on those occasions when the criminal courts have failed them.

The judicial treatment of acquaintance rape, however, displays more than the occasional breakdown of a basically trustworthy legal apparatus. The abysmal rates of prosecution and conviction of acquaintance rapists[96] indicate the criminal courts' inability to handle acquaintance rapes. Using the civil courts to handle periodic miscarriages of criminal justice may be harmless. Moving to a civil solution where the criminal courts have consistently failed, on the other hand, may

---

[94] The language of the complaints makes it clear that the plaintiffs believe Simpson murdered their children, and base their theory of wrongful death on the alleged murders. The complaint filed by Nicole Simpson's parents reads, in part, "Orenthal James Simpson . . . planned and prepared to assault, batter, and murder Nicole Brown Simpson and did thereafter brutally, and with malice aforethought, stalk, attack, and brutally beat decedent . . . . The attack was perpetrated by defendant . . . with the full knowledge that the assault and battery upon decedent's body would lead to her death . . . ." *Complaint for Damages—Survival Action*, 1995 WL 704140, *2 (Cal. Super. Doc.).

[95] *See id.*

[96] *See id.*

remove the criminal courts' incentive to reform. Simply shifting to civil venues cannot address the problem as effectively as forcing the law enforcement establishment to respond to acquaintance rape charges with the appropriate vigor.

B. *Trivializing Rape?*

Stranger rapes tend to be reasonably well reported and prosecuted. Some survivors of stranger-rape have brought civil lawsuits (often against institutional third parties).[97] Victims of acquaintance rapes are less likely to obtain criminal convictions,[98] hence the appeal of the civil courts.

Widespread use of civil lawsuits against rapists, however, runs the risk of creating a two-tier system presenting stranger-perpetrated, "violent" rapes as true crimes, and "non-violent" acquaintance rapes as mere torts. This classification reflects the lingering misunderstanding that acquaintance rapes are less serious than stranger rapes, and that somehow less guilt attaches to men who rape their friends and girlfriends than those who choose their victims off the street. Sidelining acquaintance rapes to the arena of tort law perpetuates this distinction, trivializes the attacks and utterly fails to discourage potential rapists.

Likewise, civil remedies cannot adequately punish rapists in a ways that acknowledges the violence suffered by the victim. Certainly, defending a civil suit is expensive and inconvenient. Non-indigent defendants may be forced to satisfy substantial judgments. A civil defendant, however, is never faced with the more serious threat of incarceration. More importantly, he does not suffer the societal stigma of being branded a criminal. Every rape, however, qualifies as a crime, whether or not victim and rapist know each other. Rape is a violent, deliberate and intentional crime that leaves its victims physically and emotionally devastated. Advocating civil action as a penalty for acquaintance rapes trivializes these attacks as mere torts. Civil penalties are far less likely to deter potential rapists than a properly functioning criminal system. Too often the rape itself must be disguised as another kind of wrong (such as assault and battery, deprivation of civil rights), perpetuating the notion that acquaintance rapes are not "real" rapes. Acquaintance rapes are criminal acts, and they need and deserve to be treated as such.

VI. CONCLUSION

Victims of acquaintance rape are clearly able to pursue civil claims against their attackers. Understandably, some aspects of civil procedure, such as the lower standard of proof, may attract rape victims to the civil courts. However, the loss of rape shield law protection and the difficulty of satisfying a monetary judgment against an indigent defendant constitute serious drawbacks.

From a policy viewpoint, civil litigation in rape cases offers no long-term solutions. Civil litigation deals with torts, not crimes, and acquaintance rape is in-

---

[97] *See* cases listed *supra* note 69.

[98] *See* SPOHN & HORNEY, *supra* note 24, at 19.

disputably a crime, one with painful long-term effects on its victims. Shifting acquaintance rape cases to the civil courts trivializes the criminal nature of rape and reduces the incentive for criminal courts to take these crimes seriously. While the availability of civil litigation may encourage some victims who did not report their rapes to the police to take action, civil rape litigation will not help to achieve the paramount goal of encouraging victims to report rapes to the police. Civil action does nothing to ultimately force the police, the criminal courts, and society as a whole to acknowledge the severity of the crime of acquaintance rape.

Corinne Casarino