Protecting Rape Victims from Civil Suits by Their Attackers[1]

Eric T. Cooperstein*

I. Introduction

The prosecutor for Washtenaw County, Michigan, filed criminal charges in 1987 against a recent University of Michigan graduate for raping a University senior.[2] Before the court set a trial date, the man filed a civil suit against the student for more than $10,000, alleging defamation, intentional infliction of emotional distress, and abuse of the legal process.[3] Eight months later, another man, against whom criminal charges had been filed for attacking a student outside her home, filed a civil suit against the alleged victim for slander and defamation.[4] The criminal trial had yet to be scheduled.[5]

These two cases represent rarely recorded instances in which defendants responded to criminal charges by filing civil suits for defamation against their alleged victims,[6] and the complaining parties pursued the suits to the point of some judicial proceeding. While the outcomes of these cases were neither startling nor

* B.A., Hamilton College, 1985; J.D., University of Minnesota, Class of 1990.

1. The words "victims" and "attackers" embody an assumption that a rape has indeed occurred. In fact, this article discusses civil suits by *alleged* attackers of *alleged* victims. See *infra* note 10 for an explanation of the assumptions made for the purposes of this article.

2. Mary McNamara, *Who's Suing Who*, Ms., March 1988, at 69.

3. *Id.*

4. *Id.* The University of Michigan's rape counseling center, as well as the counselors working on the case, were also charged in the civil suit. Rosenboom v. Vanek, No. 87-34091-CZ (Washtenaw County Cir. Ct. Mich. filed Oct. 20, 1987).

5. McNamara, *supra* note 2, at 69. For the outcomes of these cases, see *infra* note 7.

6. "Recorded" in the media and in actual court opinions. Our adjudicative system resolves innumerable conflicts through settlements and unilateral decisions not to pursue suits. Further, many federal and state district court actions end without a written opinion by a judge; many written decisions never see publication in a reporter. Although it is literally impossible to tell how often defamation suits may have been used to "convince" victims to withdraw their criminal complaints, forcing the prosecutor to drop rape charges, at least one instance arose in Colorado in 1989. *See Alleged Rapists Suing Victims in Colorado*, Minneapolis Star Tribune, Feb. 14, 1989, at 3A. Even in the Michigan cases, *Ms.* was the only national publication to report the story. See *infra* notes 92-94 and accompanying text for further discussion of media treatment of rape.

heartening,[7] they may have marked the beginning of a trend that shocks one's sensibilities.[8] Ordinarily, an innocent defendant will be exonerated by the criminal process through the heavy burden of proof the prosecution must sustain.[9] If, on the contrary, a culpable defendant can prevent a complainant from ever reporting an assault to the police, then a violent felon never need fear prosecution. Defamation suits, brought before criminal liability has been assessed,[10] could upset the delicate balance of power among criminals, citizens, and law enforcement officers.

Over the last fifteen years, feminists have won hard-fought battles to pass rape law reforms and rape shield statutes. These laws attempted to protect rape victims and to encourage them to report rapes.[11] By doing so, the drafters tried to shift the focus of

---

7. In the first case, the defendant was acquitted and the civil suit eventually settled out of court. Telephone interview with Julie Steiner, coordinator at University of Michigan's Sexual Assault Prevention and Awareness Center, Ann Arbor, Michigan (Oct. 6, 1988). In the second, the criminal suit was dismissed based on an improper charge, and in the civil suit, a motion for summary disposition was granted in favor of the woman and affirmed on appeal. Rosenboom v. Vanek, No. 111412 (Mich. Ct. App. Sept. 12, 1989).

8. Vanessa Kelly, director of the Rape Crisis Center in Boulder, Colorado, notes a marked reluctance of women calling the center for help over the past four months to report sexual assaults to the police. She attributes this to the defamation suits filed against assault victims in the past few months. Telephone interview with Vanessa Kelly (Aug. 22, 1989).

9. Although it is difficult to quantify the number of people the criminal system wrongly convicts, it is generally thought to be less than 1% of all convictions, and many of those resulted from plea bargains and not full trials. C. Ronald Huff, Arye Rattner & Edward Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518, 519, 523, 529-30 (1986).

10. This article will assume that when a woman files a rape complaint and the county prosecutor finds sufficient evidence to file rape charges against a defendant, some form of sexual assault has occurred. The suspicions that police officers and prosecutors harbor against women operate against the filing of rape charges enough to warrant this assumption. *See* Lynda Lytle Holmstrom & Ann Wolbert Burgess, The Victim of Rape: Institutional Reactions 41-44, 142-48 (1978). For discussion of what constitutes consent, see *infra* notes 33-42 and accompanying text.

This article will also assume that the rape victims are female, since that is overwhelmingly the case. *See* Susan Caringella-MacDonald, *The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective?*, 31 Crime & Delinq. 206, 213-14 (1985) (84% of sexual assault victims in study were female; 98% of all sexual assault defendants were male).

11. Ironically, Michigan was the first state to enact a rape shield statute and the first to reform its criminal rape statute. Both have been hailed as successful legislation. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 765 n.3 (1986); Jeanne C. Marsh, Alison Geist & Nathan Caplan, Rape and the Limits of Law Reform 11 (1982).

"Rape shield statute" is a colloquial term for the large number of laws passed in the late 1970s to amend character evidence rules to restrict the admission of evidence of a rape victim's sexual history during a criminal rape trial. *See infra* notes 169-175 and accompanying text.

the trial from the victim to the defendant by requiring the state to prove first the defendant's use of force, not the victim's nonconsent.[12] In a sharp backlash, these defamation suits threaten to nullify the progress of the last decade and a half. Civil discovery procedures may conceivably be initiated long before a criminal trial to frighten and embarrass the victim.[13] Character evidence, the defense lawyer's greatest weapon for making the *victim* seem guilty, may be admissible in a civil trial when it would not be allowed in a criminal trial.[14] Left to proliferate unfettered, these suits will serve as a new, forcible deterrent to women who wish to file criminal complaints of sexual assault or rape.[15]

This article analyzes the impact of defamation suits on rape victims from all of these angles.[16] Throughout, the article focuses on the insidious idea that women are lying, spiteful people who will lure men into illicit intercourse and then "cry rape" to explain their actions or to avenge unrequited love[17]—a notion that recurs constantly in societal attitudes, in statements by law enforcement and medical personnel, in Anglo-American legal history, in rules of evidence (including rape shield statutes), and in judge and jury decisions. While this attitude will likely persist for years to come, this article proposes legislative and judicial solutions that may prevent defamation suits from unduly burdening women and from pushing our jurisprudence back toward its sexist origins.

II. The Scope of Rape

A. Empirical Framework

Rape has long been accepted as a fact of life in our society. Historically, men punished rapists not because they violated and humiliated women, but because by the prevailing double standards rape made "their" women less valuable.[18] Rape has been glorified in war[19] and trivialized in peace; it appears without morbidity in

12. *See infra* notes 44-45 and 169-175 and accompanying text (on statutes).

13. *See infra* notes 127-153 and accompanying text (on discovery).

14. *See infra* notes 156-190 and accompanying text (on character evidence).

15. Many deterrents that keep rape reporting rates down exist already. *See infra* notes 27-32 and accompanying text.

16. The term "rape" will encompass, for this article, all forced sexual contact, whether it be touching or penetration, without consent. This includes both stranger and non-stranger ("acquaintance") sexual assaults. Of the two Michigan cases, one was a stranger rape and the other an acquaintance rape. McNamara, *supra* note 2, at 69.

17. *See infra* notes 50-94 and accompanying text (on theoretical framework).

18. Susan Brownmiller, Against Our Will: Men, Women and Rape 16-30 (1975).

19. Brownmiller catalogs a history of rape by conquering armies, from the de-

our movies, books, and music.[20] While it is not the most frequently committed violent crime, it is the one most often committed just to terrorize its victim. Contrary to common belief, rape is a violent act, not a sexual one.[21] Rapists do not seek material gain. Rape usually does not arise from provocation amid a dispute.[22] Men do not rape by accident.

Crime statistics show that more than 90,000 reported rapes occurred in 1986, almost 250 rapes a day.[23] Yet several studies indicate that one-fourth of all women have been the victims of sexual assault at least once.[24] Applying this figure to the 125 million women in this country[25] means that over *30 million* women have been sexually assaulted. Thus, the number of women who have been victimized far exceeds the number who register their complaints with the police. The disparity between the number of women who say they have been sexually assaulted and the number of complaints the police receive exists because most women—as many as 90% or more—do not report rape to the police.[26]

---

feat of Constantinople in 1204 to the Vietnam War. Brownmiller, *supra* note 18, at 35, 86-113.

20. *Id.* at 295-308.

21. *Id.* at 391. "Rape is a 'pseudo-sexual act, a pattern of sexual behavior that is concerned much more with status, aggression, control, and dominance than with sensual pleasure or sexual satisfaction.' Power or anger is the dominant motive for rape, and the offender uses sexuality to act out his aggression." Cynthia Ann Wicktom, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 Geo. Wash. L. Rev. 399, 400 (1988) (citing A. Nicholas Groth, Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape: Power, Anger, and Sexuality*, 134 Am. J. Psychiatry 1239, 1239-41 (1977)).

22. Wicktom, *supra* note 21, at 400.

23. The World Almanac and Book of Facts 824 (Mark S. Hoffman ed. 1988) [hereinafter World Almanac]. *See also* Sourcebook of Criminal Justice Statistics: 1986, at 153-81 (Katherine M. Janieson & Timothy J. Flanagan eds. 1987) (breakdowns of statistics and further information).

24. One survey of 930 adult women in San Francisco in 1978 found 22% to have been victims of either attempted or completed rape; 56% responded as having had forced intercourse or intercourse obtained by threat. Susan Estrich, Real Rape 12 (1987) (citing Diana E. H. Russell & Nancy Howell, *The Prevalence of Rape in the United States Revisited*, 8 Signs 688 (1983); Diana E. H. Russell, Sexual Exploitation 34-37, 101 (1984)). A University of Rhode Island survey of 542 women revealed 29% had experienced sexual assault. Edwin M. Schur, Labeling Women Deviant: Gender, Stigma, and Social Control 149 (1984). A *Ms. Magazine* sponsored survey of 7,000 women at 35 different colleges and universities found one-fourth of the women to have been the victims of rape or attempted rape. Ellen Sweet, *Date Rape: The Story of an Epidemic and Those Who Deny It*, Ms., Oct. 1985, at 56, 58.

25. Based on estimated female population as of July 1, 1986. World Almanac, *supra* note 23, at 533.

26. Not only did 90% of the women in the *Ms. Magazine* survey not report the crime to the police, but one-third of them did not discuss their experience with anyone. Sweet, *supra* note 24, at 58. Another study indicates that women report less than 5% of all rapes committed on college campuses. Estrich, *supra* note 24, at 12 (citing Suzanne S. Ageton, Sexual Assault Among Adolescents 130-34 (1983)).

Women have numerous reasons for not reporting rape: the trauma of the experience;[27] fear of the assailant taking revenge;[28] "success" in resisting actual penetration (thus thinking that no crime had occurred);[29] or simply not believing that sexual pressure in a dating situation is aberrant or illegal behavior.[30] One frequently cited reason is the wish to avoid the stress and the futility of the criminal justice system and the ordeal of trial.[31] Victims fear being blamed, being "put on trial" themselves, and being humiliated.[32] A civil defamation suit, which could *force* the victim to face a trial, would encourage many women to withdraw their rape complaints to avoid additional fear, costs, time, and frustration.

The trauma of legal proceedings in rape cases stems from the uniqueness of rape as compared to other felonies. Unlike the crimes of theft, assault, battery, and trespass, which traditionally include nonconsent as a required and implicit element, the law of rape requires that its victims demonstrate their "wishes" through physical resistance.[33] Concurrently, courts often find that not enough "force" was used to constitute rape (e.g., the woman had too few bruises or did not scream very much).[34] This logic dictates that force can only be present when the man overcomes the woman's nonconsent, so the prohibition of force becomes defined by the level of the woman's resistance.[35] Except for rape, criminal law does not recognize the concept of "comparative negligence."[36] One can hardly imagine an aggravated robbery trial revolving around how much the victim resisted having her property stolen. Not only is it unreasonable to demand that a woman resist with the strength of a man, since women are often smaller,[37] it is dangerous advice: the rapist may respond with mortal force.[38] Only

27. Holmstrom & Burgess, *supra* note 10, at 58, 232-33.

28. *Id.*

29. Estrich, *supra* note 24, at 13.

30. *Id.*; Schur, *supra* note 24, at 151.

31. Schur, *supra* note 24, at 151; Holmstrom & Burgess, *supra* note 10, at 58.

32. Holmstrom & Burgess, *supra* note 10, at 58, 232-33.

33. Estrich, *supra* note 24, at 29. All but nine states include a resistance requirement in their criminal rape statutes; the requirements differ widely in form from state to state. Wicktom, *supra* note 21, at 405.

34. Estrich, *supra* note 24, at 58-71 (citing several modern court decisions where the act lacked sufficient "force" to be rape).

35. *Id.* at 60.

36. "It is no defense or excuse in a prosecution for a crime that the victim was contributorily negligent." Charles E. Torcia, Wharton's Criminal Law § 47, at 235 (14th ed. 1978).

37. Estrich, *supra* note 24, at 22.

38. "One rapist answered, 'When my victim screamed, I ran;' another said, 'When my victim screamed, I cut her throat.' " Holmstrom & Burgess, *supra* note 10, at 176.

the victim can determine the best response to a rape; her choice should not deprive her of the protection of the law.[39]

Rape law is also unique in its failure to treat defendants and victims equally. Most jurisdictions have statutory rape laws, instilling the idea that females below an arbitrary age cannot possibly consent to a sexual act.[40] Contrarily, most jurisdictions have codified a married woman's automatic consent to sexual intercourse through the marital rape exceptions found in common law and in rape shield statutes.[41] These legal perversions have persisted because the courts never have been able to distinguish satisfactorily a mutually desired sexual act from an act of sexual violence.[42]

Because of this failure, courts additionally require corroboration of a woman's nonconsent. Other felonies provide ample corroboration: stolen goods, witnesses, weapons. Rape, particularly acquaintance rape, often leaves no corroborating evidence, making conviction difficult.[43] Thus, a woman who does not resist a rapist is, statistically and practically, the least likely to see him convicted, but probably the most likely to be sued for defamation by her attacker, since he too knows that there is no corroborating evidence. This "unique" felony thus lends itself more readily to harassing defamation suits than other crimes.

Even though rape laws have been reformed in Michigan and Illinois to shift the focus of the crime from the victim's nonconsent

---

39. Wicktom, *supra* note 21, at 404-05. Since rape is a crime of violence, consent should not even be a factor. *See id.* at 406.

40. Brownmiller, *supra* note 18, at 382. This may certainly be true for preteens, but teenagers "consent" to sexual activity all the time. (It is unlikely as well that a court would accept as force the myriad of social pressures that result in this consent.)

41. The marital rape exception prohibits the prosecution of a husband for raping his wife. Brownmiller, *supra* note 18, at 380. In fact, the common law defined rape as forcible sexual intercourse with a woman *not one's wife*. *Id.* Feminists have posited that this coincides with a view of women as property: a man cannot be charged with "taking" that which is legally his through marriage. Schur, *supra* note 24, at 152.

Eighteen states have specifically retained the marital rape exception in their rape shield statutes: Alabama, Arizona, Colorado, Idaho, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas. Nineteen other states make no exception for marital rape as long as force and/or injury are present: Arkansas, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, and Wyoming. Only four states, Alaska, New Hampshire, New Jersey, and Wisconsin, allow spousal prosecution for all crimes. Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 Women's Rts. L. Rep. 25, 33 (1987).

42. Brownmiller, *supra* note 18, at 384.

43. Estrich, *supra* note 24, at 21. One study showed that in New York City no more than 8% of all arrests for rape led to convictions. Schur, *supra* note 24, at 151.

to the offender's forcible conduct, it is difficult to determine how successful they have been.[44] Other critics contend that these efforts to make rape less "special" and more like other crimes devalue the crime of rape and its traumatic impact on the victim.[45] Women have fought back by filing civil suits against their attackers for personal injury and emotional distress,[46] and against third parties such as landlords and employers for failing to take action in light of foreseeable risks to women.[47] Although a number of women have sued and won multi-million dollar verdicts,[48] this route remains closed to most women for the same reasons that deter them from reporting rape and that make conviction difficult.[49]

B. Theoretical Framework: Women Lie

Lord Chief Justice Matthew Hale, the famous seventeenth century English jurist, neatly summed up the attitude of men and the law toward women and rape when he stated, "Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[50] Indeed, the male fear of false accusation has been handed down since Biblical times and has "formed the crux of the legal defense against a rape charge, aided and abetted by that special set of evidentiary standards (consent, resistance, chastity, corroboration) designed with one collective purpose in mind: to protect the male against a scheming, lying, vindictive woman."[51] This premise underlies all the empirical information set out above and surfaces in the attitudes of judges, juries, and society. It implicitly condones the idea of a defamation suit against a rape victim.

The courts were particularly vocal early in this century. One judge adamantly stated that without the corroboration rule, "every

---

44. *Compare* Marsh, Geist & Caplan, *supra* note 11, at 105-19 (supporting success) *and* Wicktom, *supra* note 21, at 418-25 (doubtful of success). *See also* Caringella-MacDonald, *supra* note 10, at 219 (objective of reform statutes to treat sexual and nonsexual assaults comparably has been met at least partially in Michigan study).

45. David J. Giacopassi & Karen R. Wilkinson, *Rape and the Devalued Victim*, 9 Law & Hum. Behav. 367, 380 (1985).

46. Jack Epstein, *Legal Aids*, Student Law., March 1988, at 51.

47. Susan E. Loggans, *Rape as an Intentional Tort: First- and Third-Party Liability*, Trial, Oct. 1985, at 45.

48. Epstein, *supra* note 46, at 52 ("Civil suits do not necessarily relieve the plaintiff of the emotional trauma characterized in many criminal cases."). *See infra* note 124 (on the costs of litigation).

49. *See supra* notes 27-32 and accompanying text (on deterrents to reporting).

50. Brownmiller, *supra* note 18, at 369 (citing Matthew Hale, History of the Pleas of the Crown 634 (1847)).

51. *Id.* at 386-87.

man is in danger of being prosecuted and convicted on the testimony of a base woman in whose testimony there is no truth."[52] This is not just a relic from the past. A Minnesota judge affirmed this statement just twenty years ago;[53] a Columbia Law Review article went even further:

> Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false. . . . Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough evidence to convict a man of a crime.[54]

In some cases, the court finds the victim's story to be "inherently incredible,"[55] though the court never grapples with why a prosecutor would have bothered to bring such a case to trial in the first place. The law and its processes have developed not to prosecute rapists but to shield them from punishment for their brutality.

This view of the legal system, as a means by which politically dominant males have protected themselves from charges of rape,[56] can still be supported. By 1985, fewer than 8% of the 13,000 state

---

52. Davis v. State, 120 Ga. 433, 435, 48 S.E. 180, 181 (1904) (93 pound woman who had been sick for five years did not resist enough to provide corroborating evidence of rape).

53. Corroboration is required because "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed." State v. Anderson, 272 Minn. 384, 387, 137 N.W.2d 781, 783 n.2 (1965) (quoting Glanville Williams, *Corroboration—Sexual Cases*, 1962 Crim. L. Rev. 662). The court called a seventeen-year-old girl's accusation of her father of five years of incest a "classic conflict between a frustrated daughter and an unduly strict father." *Anderson*, 272 Minn. at 385, 137 N.W.2d at 782. *See also* State v. Wulff, 194 Minn. 271, 272, 260 N.W. 515, 516 (1935) (The defendant's rape conviction was reversed where despite woman's testimony of "extreme use of force . . . , [t]here was no loss of consciousness; no threat of reprisal. There were no screams or outcries.").

54. Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137, 1138 (1967) [hereinafter Note]. As Estrich notes in her book, the author cited no authority for this proposition. *Id.*; Estrich, *supra* note 24, at 43. The anonymous Note, in support of the strict New York corroboration requirement of that time, sought "to eliminate or make negligible the otherwise considerable danger that innocent men will be convicted of rape." Although a rapist might occasionally go free, the corroboration rule "is consistent with the best traditions of Anglo-American law." Note at 1141. The author cites no statistics or other authority to support this idea either. *Id.*

55. Barker v. Commonwealth, 198 Va. 500, 504, 95 S.E.2d 135, 137-38 (1956) (testimony of woman "too fantastic and improbable" where she said she accepted a ride from two men and they raped her while en route); Young v. Commonwealth, 185 Va. 1032, 1033, 1042, 40 S.E.2d 805, 810 (1947) (woman's testimony of rape by garage mechanic after she had picked up several hitchhikers and lost all her money was credible but contained "too much that is contrary to human experience" to sustain guilty verdict).

56. Giacopassi & Wilkinson, *supra* note 45, at 368.

and federal judgeships across the nation were held by women.[57] Women hold fewer than 17% of the seats in all state legislatures; only twenty-eight women sit among the 535 members of Congress.[58] Until recently, the law of Massachusetts stated that all women jurors had to be informed that they could choose to decline to hear a case involving a sexual crime, such as rape.[59] In light of the continuing exclusion of women from the legal system, it is not surprising that rape shield statutes and rape reform laws have failed to address the central imbalances in rape cases.[60]

The persistence of this bias appears in the survival of the "fresh complaint rule." As in no other crime, the failure of the rape victim to file her complaint soon after the assault casts suspicion on the veracity of her charge.[61] Blackstone viewed it two centuries ago as a "strong but not a conclusive presumption against a woman."[62] Not too long ago, the Model Penal Code required a complaint within at least three months and at least six states followed its lead.[63] A 1960s California police manual stated that "[t]he majority of 'second day reported' rapes are not legitimate."[64]

In practice, either party may use evidence of when the woman filed her complaint either to support or to discredit the witness, a procedure inherently prejudicial in itself.[65] Aside from the

57. Fund for Modern Courts, Inc., The Success of Women and Minorities in Achieving Judicial Office: The Selection Process 9-10 (1985).

58. National Women's Political Caucus, National Directory of Women Elected Officials (1989) (statistics as of 1988).

59. Holmstrom & Burgess, *supra* note 10, at 228.

60. *See infra* notes 169-172 and accompanying text (on rape shield statutes).

61. Estrich, *supra* note 24, at 53 (citing Stewart v. State, 25 Ala. App. 266, 145 So. 162 (1932) (failure of thirteen-year-old to tell her parents of rape by someone she knew relevant to prove falsity)).

62. Estrich, *supra* note 24, at 53 (citing Sir William Blackstone, 4 Commentaries on the Law of England 211 (reprint 1st ed. 1769)).

63. Model Penal Code § 213.6(5) (1962). The Model Penal Code did not suggest a prompt complaint rule for any other offense. Model Penal Code §§ 210-251. The six states were Connecticut, New Hampshire, North Dakota, Hawaii, Pennsylvania, and Utah. Estrich, *supra* note 24, at 54.

64. Brownmiller, *supra* note 18, at 364.

65. Wicktom, *supra* note 21, at 412. *See also* Padilla v. People, 156 Colo. 186, 188, 397 P.2d 741, 743 (1964) (ruling both that evidence of the victim's complaint after the alleged rape is admissible for the purpose of corroborating her testimony and that evidence of her failure to make a complaint soon after the alleged rape is admissible to discredit her testimony); Willis v. Commonwealth, 218 Va. 560, 563, 238 S.E.2d 811, 813 (1977) (stating that failure to report promptly casts doubt on the truthfulness of the victim's story).

There may be a hearsay problem here. Federal Rule of Evidence 801(d)(1)(B) states that prior consistent statements of a witness are only admissible when "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ." Fed. R. Evid. 801(d)(1)(B). This works to the defendant's favor. Where a woman reported promptly, the prosecution would theoretically have to wait until the defendant raised the issue of late

outrageous idea that women who report a crime a week, a month, or six months after it happens should be any less trusted than a man who reports a crime after a time-lapse, a woman might delay reporting just out of fear of the unreceptiveness of the police, prosecutors, and even friends and family.[66] In a defamation suit, such evidence might well be used to support a theory that the woman contrived her accusation. No logical connection exists between delayed reporting and a scheme to defame someone. The evidence would serve only to prejudice the jurors against the victim.

The parties in any trial focus on persuading the jury, and the defense lawyer will use a wide range of tactics to prove the victim is lying. Historically, many rape trials focused on the issue of the victim's veracity instead of on the criminal conduct of the defendant, inspiring rape law reforms.[67] Nevertheless, defense attorneys will do their best to enter evidence of the victim's sexual reputation, exploiting the concept that women are one-dimensional, either madonnas or whores.[68] The attorney will focus on the misperception that if a woman consented to sex before, she probably consented to sex this time, too.[69] The Model Penal Code automatically downgrades the severity of the offense when there is a past relationship of intimacy.[70] Courts did recognize the dangerous prejudicial value of sexual history long ago: a man's sexual history rarely becomes an issue at trial.[71] Until the advent of rape shield laws, a defense attorney's cross-examination was limited only by the sensibilities of the judge to exclude the evidence when its effect would be more prejudicial than probative.[72] As will be discussed below, even the rape shield laws have not eliminated the "automatic consent" idea from criminal trials; other character evi-

---

complaint (implying falsehood) and then submit the evidence. If the woman delayed reporting, the defense could submit the evidence of the timing of the complaint right away to rebut the victim's direct testimony.

66. Estrich, *supra* note 24, at 54.

67. *See supra* note 44 and accompanying text.

68. Holmstrom & Burgess, *supra* note 10, at 177.

69. *Id.*

70. Model Penal Code § 213.1(1).

71. Estrich, *supra* note 24, at 49 (citing Packineau v. United States, 202 F.2d 681 (8th Cir. 1953) (cross-examination of accused rapist as to his illegitimate family and about arrests for alleged disorderly conduct was prejudicial and reversible error); People v. Biescar, 97 Cal. App. 205, 223, 275 P. 851, 859 (1929) ("insulting" and "harsh" cross-examination of defendant by prosecutor degraded defendant in eyes of jury and was grounds for reversal)).

72. Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

dence rules might allow attorneys much wider latitude in civil defamation trials.

Other defense lawyer tactics focus on discrediting the victim with evidence of personal traits commonly accepted in other people. Since women are assumed to be more emotional than men, if the victim does not become hysterical on the witness stand, the jury may assume nothing happened—although surveys and interviews indicate that in fact most victims consciously try to maintain control over their emotions just to survive the ordeal of trial.[73] Of course, if she does become emotional, she may be harassed for not remembering details.[74] Being on welfare, drinking, or using drugs will be offered to imply that the woman consented to sex for money and then complained when she was not paid.[75] Women will be portrayed as fickle, as seeking revenge on past lovers, as trying to escape moral "punishment" for having illicit sex, and as fantasizing about rape when in fact nothing occurred.[76]

Nor can one rely on the sensibilities of the judge to rule out centuries of prejudicial practices. A New York review board censured one judge for telling the press that he thought one stranger rape had "started without consent, but maybe they ended up enjoying themselves."[77] In giving a light sentence to a young man convicted of four counts of sexual assault, a judge reasoned that "this is normal behavior for an adolescent."[78] A Colorado judge said that a man who impersonated a police officer and strip-searched two female teenagers did them and the community a favor.[79] A New York judge slapped the hand of a female attorney as she reached for a law book; he said he "like[d] to hit girls because they are soft."[80] Other judges have been known to call attorneys "little girl," "kitten," and "bitch."[81] So much for the neutral administration of justice.

Not surprisingly, juries often have no special sympathy for rape victims. In addition to accepting the types of prejudices noted above, jurors often go beyond the issues to scrutinize the victim closely and often harshly.[82] Often they are prodded by biased in-

73. Holmstrom & Burgess, *supra* note 10, at 187.
74. *Id.*
75. *Id.* at 183.
76. *Id.* at 190-93.
77. Report of the New York Task Force on Women in the Courts 74 n.125 (1986) [hereinafter Women in the Courts].
78. Katherine Burkett, *There Ought to Be a Law*, Ms., Dec. 1987, at 74.
79. *Id.*
80. *Id.*
81. Women in the Courts, *supra* note 77, at 213 n.325.
82. Brownmiller, *supra* note 18, at 374.

structions from the judge, who tells them to evaluate the woman's nonconsent even when consent is not an element of the criminal rape statute.[83] In an effort or desire to judge the victim, jurors will bootleg concepts such as contributory negligence and assumption of risk from other areas of law to reach their decision.[84] Presumably, the same predispositions would work against a woman in a defamation suit.

These prejudices, subtly reflected by juries, are stated openly by other parts of the criminal justice system. The police have their own criteria for determining the legitimacy of a rape complaint; some officers do not believe rape occurs at all.[85] Others merely judge the quality and the consistency of the information the victim gives them, and examine her behavior and moral character.[86] Although polygraphs are inadmissible as evidence in court, police and prosecutors require rape victims to take them more often than victims of other crimes.[87] The examination is used to test the victim's willingness to pursue the charge, to stand the stress of trial, and to check the veracity of her allegations.[88] If the victim cannot jump through all the necessary hoops, she will not be a "successful" rape victim. Her case will be "unfounded": not pursued to trial.[89]

Even emergency room personnel, often the victim's first personal contact after a rape, try to evaluate a victim's legitimacy from the moment she walks in the door. Many doctors and nurses believe that a person can only be "really raped" by a stranger; aquaintance rape does not qualify in their minds as a traumatic experience.[90] So in addition to looking for clinical evidence of rape, hospital staff members look for a consistent story and try to determine if and how well the victim knew her assailant.[91] This defies logic. One can construct an argument as to why a typically vindic-

---

83. *See* Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 10, 96 (1977) (evaluating suggestions for jury instructions tailored to rape cases).

84. Brownmiller, *supra* note 18, at 374.

85. *Id.* at 365. Although Brownmiller states she encountered this specific reaction from a group of officers in 1972, there are few reasons to think all officers' consciousnesses have been raised since then. Recently, a University of Minnesota campus police officer was quoted as saying that women who are intoxicated are responsible if sexually assaulted. Stephanie Armour & Woody McBride, *U Police Capt. House Reprimanded for Remarks*, Minnesota Daily, Nov. 11, 1988, at 1.

86. Holmstrom & Burgess, *supra* note 10, at 42-43, 52-53.

87. Wicktom, *supra* note 21, at 413.

88. *Id.*

89. Schur, *supra* note 24, at 151.

90. Holmstrom & Burgess, *supra* note 10, at 72-73.

91. *Id.*

tive woman who wishes to falsely accuse someone of rape would go to the police, but why would she go to an emergency room? Contrary to what one might suppose, doctors and nurses are no more enlightened than other participants in the criminal justice system.

While the above scenarios occur daily across the nation, the mass media give excessive attention to stories of women who are perceived to have lied about being raped. The case of Tawana Brawley, a young woman who attested that she had been raped by six men, was followed in daily newspapers for months.[92] Similarly, in 1985 a woman came forward to proclaim the innocence of the man who had been convicted of raping her six years earlier;[93] seven national news magazines extensively reported the story.[94] However, we hear little of the other 250 *reported* rapes that occur on an average day.

Our society reflects a belief that women lie about having been raped; the criminal justice system spends an inordinate amount of energy trying to prove that point. Through civil defamation suits, individuals can take it upon themselves to prove it, too.

C. Defamation

The tort of defamation has developed through the common law. It was not created by legislators trying to provide a remedy for a recurring offense, but arose through the haphazard process of litigating disputes and following selected precedents.[95] Generally, defamation is defined as a communication that tends to injure the reputation of a person, to diminish the esteem in which the person is held.[96] Although in general a plaintiff may not bring an action for defamation unless she or he proves damages,[97] the courts invented certain exceptions long ago, one of which is the imputation of a crime.[98]

---

92. Robert D. McFadden, *Brawley Made Up Story of Assault, Grand Jury Finds*, N.Y. Times, Oct. 7, 1988, at A1, col. 1.

93. Mark Starr, *More than a Case of Rape*, Newsweek, Apr. 22, 1985, at 21.

94. The winner was *Newsweek* with four stories, then *Time* and *People Weekly* with three apiece; *McLeans*, *Christianity Today*, *Redbook*, and *Mademoiselle* also reported the incident. 45, 46 Readers' Guide to Periodical Literature (Jean M. Marra ed. 1985 & 1986) ("Rape").

95. W. Page Keeton, Prosser and Keeton on Torts § 111, at 772 (5th ed. 1984). For a detailed history of the development of defamation, see Wardlaw v. Peck, 282 S.C. 199, 207-10, 318 S.E.2d 270, 275-77 (1984).

96. Keeton, *supra* note 95, § 111, at 773. *See also* Henderson v. Guillory, 546 So. 2d 244 (La. App. 1989).

97. Keeton, *supra* note 95, § 112, at 788.

98. *Id. See also* Laws v. Thompson, 78 Md. App. 665, 684, 554 A.2d 1264, 1274 (1989) (plaintiff in defamation action may recover general damages for injury to reputation without proof of such injury); Moore v. Streit, 181 Ill. App. 3d 587, —,

In other words, a plaintiff complaining of false accusation of a felony need not prove any actual harm to reputation or any other damage.[99] The alleged rape victim incurs strict liability upon making the accusation. Proof of the accusation itself is considered sufficient to establish the existence of some damages, and the jury is permitted, without other evidence, to estimate their amount.[100] Most jurisdictions have further limited the exception from proving damages by allowing it only where the plaintiff has been accused of a crime of "moral turpitude."[101] Moral turpitude has never received more than a vague definition,[102] but a charge of rape probably fits the bill. Another common law tort, malicious prosecution, mimics characteristics of defamation to the extent that a false charge of a crime is actionable *per se*.[103]

Interestingly, almost all the cases cited to support these rules of law date back to the early third of this century; most of the cases were decided before women even had the right to vote.[104] Most defamation suits in recent years have involved general comments about reputation or civil rights suits against municipalities. Defamation has been alleged for imputation of homosexual acts,

---

537 N.E.2d 408, 414 (1989) (communications are considered defamatory *per se* if they are injurious on their face and impute commission of a criminal offense); Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1091 (Ala. 1988).

99. *Nelson*, 534 So. 2d at 1092 ("[I]mputations of indictable criminal offenses are slanderous per se and relieve the plaintiff of the requirement of proving actual harm to reputation or any other damage."). Defenses include truth of the statements and privilege. *Henderson*, 546 So. 2d at 248. The former can only be proved at trial. For discussion of the latter, see *infra* notes 121-122 and accompanying text.

100. Keeton, *supra* note 95, § 112, at 788. *See also* 50 Am. Jur. 2d *Libel and Slander* § 1 (1970) (Defamation turns on whether the communication or publication tends, or is reasonably calculated, to cause harm to another's reputation, but it is not necessary for the plaintiff to prove that this was the actual result.).

101. Keeton, *supra* note 95, § 111, at 778. *See also* 50 Am. Jur. 2d *Libel and Slander* § 28 (1970) (citing Restatement (Second) of Torts § 571 (1977) (no proof of special harm needed if the offense imputed is punishable by imprisonment or involves moral turpitude)).

102. Keeton, *supra* note 95, § 112, at 789. Keeton quotes a definition of "inherent baseness or vileness of principle in the human heart." *Id.*

103. Greer v. Skyway Broadcasting Co., 256 N.C. 382, 391, 124 S.E.2d 98, 104 (1962) ("Any written or spoken words or pictures falsely imputing that a person is guilty of the crime of rape or robbery are actionable *per se*, because these crimes involve moral turpitude."). "To make out a case of malicious prosecution, the plaintiff must allege and prove that the defendant initiated or took part in a criminal proceeding against the plaintiff maliciously, without probable cause, which ended in failure." *Id.* at 389, 124 S.E.2d at 104. *See also* Dudley v. Nowill, 11 A.D. 203, 204, 42 N.Y.S. 681, 682 (1896) (when spoken words can be understood to impute a crime, they are *prima facie* actionable and no innuendo is necessary); Sanders v. Daniel Int'l Corp., 682 S.W.2d 803, 807-09 (Mo. 1984) (discussion of malice).

See generally Keeton, *supra* note 95, §§ 111, 112, at 771-78, 785-89 (outlining the tort of common law defamation and relying primarily on case law more than fifty years old).

104. Women received the right to vote in 1920. U.S. Const. amend. XIX.

religious beliefs, venereal disease, and lack of fitness to hold office, among other reasons.[105] Of recent defamation suits, only a few concern the "imputation of a crime involving moral turpitude."[106]

The idea of suing a woman for defamation following her accusation of rape seems to be a new one. It may have been threatened before, but appears in only one other instance in newspapers and court records, and the parties withdrew before reaching court.[107] The deterrent effect on reporting rape lies not just in the filing of defamation suits, but in the entire process of seeing them through.

III. Civil Suits

Although the civil law spawned the criminal law in England seven centuries ago,[108] the two have since grown apart and now differ in fundamental ways. The remainder of this article focuses on the impact on rape victims of three areas of difference between civil and criminal suits: procedural posture and privileged communications, discovery, and character evidence rules.

A. Procedural Posture and Privileged Communications

Civil and criminal law both protect defendants from being put through the horrors of litigation twice. In criminal matters, the Constitution specifically prohibits trying a person twice for the same crime.[109] Similarly, on the civil side, the principles of *res judicata*[110] and collateral estoppel[111] prevent the same set of facts or the same issues from being tried twice. In both arenas, if the

105. 50 Am. Jur. 2d *Libel and Slander* §§ 70, 81, 88, 106 (1970). The text of this encyclopedia cites a litany of different types of defamation suits. *Id.*

106. Keeton, *supra* note 95, § 111, at 778.

107. In California in 1986, a woman claimed a police officer stopped her for drunk driving. After she failed a sobriety test, he handcuffed her and placed her in the front seat of his police cruiser. The woman alleged that the officer later pulled over to the side of the road, forced her out of the car, and raped her while she was still in handcuffs. The local sheriff's department cleared the officer of any wrongdoing even though investigators failed to preserve crucial evidence, such as the woman's clothing. Although she never filed a formal complaint, the police responded to her allegations by having prosecutors charge her with criminal slander. A judge dismissed the case, finding that the woman's conversations with police investigators were privileged and could not be used to prosecute her. H.G. Reza, *Rape, Slander Alleged; Charges Facing Accuser of CHP Officer Dropped*, L.A. Times, Aug. 7, 1986, Part 2, at 2, col. 5 (San Diego County ed.).

108. Criminal law developed as the notion of an offense changed from an injury to an individual to an injury to the state. Charles W. Thomas & Donna M. Bishop, Criminal Law: Understanding Basic Principles 22 (1987).

109. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

110. The judicially created doctrine of *res judicata* holds that a final judgment on the merits of a case bars further claims by parties or their privies based on the same cause of action. Brown v. Felsen, 442 U.S. 127, 131 (1979). The doctrine en-

court finds for the prosecution/plaintiff, the court then sets a sentence or awards damages and ends the litigation, save any appropriate appeals. If the court finds for the defendant, the law deems that a person who has done nothing wrong should not be vexed by endless lawsuits until a particularly sympathetic jury or judge can be found to reach the "right" decision.[112]

These protections, however, do not operate *between* the criminal and civil realms. A criminal conviction for assault and battery generally will not prevent the victim from bringing a civil action in tort for assault and battery.[113] The elements of the two crimes differ: a prosecutor must prove that the defendant violated a criminal statute that carries a penalty, while the civil plaintiff must prove the elements of the cause of action, such as intent and damages.[114] In fact, rape victims must prove elements different from those litigated at a criminal trial when they sue their attackers for damages, as noted above.[115] In these cases, the lack of a prohibition on civil suits following criminal trials works in the victim's favor. At the same time, defamation suits may have a tragic effect on victims.

These effects become clearer upon a general analysis of the two suits. The burden of proof differs in each type of case. Since a criminal charge jeopardizes a defendant's constitutionally protected liberty, the law requires proof beyond a reasonable doubt.[116] Civil suits, usually involving only monetary penalties, require a lesser standard of proof, i.e., proof by a preponderance of the evidence, generally thought of as 51%.[117] Thus, evidence that will sustain liability in a civil trial may not suffice to prove guilt in a

courages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Id.*

111. Collateral estoppel, also known as issue preclusion, prevents a second suit by a party, even on a different cause of action, if the judgment in the first suit resolved the issues that would be contested in the second suit. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

112. *Brown*, 442 U.S. at 131. No principle of law sanctions rejection by a federal court of the salutory principle of *res judicata*. Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981).

113. There is the possibility that the judge might, as part of the sentence, order that the defendant compensate the victim for damages, thus possibly barring a civil suit on the same question. This is an unlikely prospect, however, because damages will not usually be an issue in the criminal trial. *But see* Duncan Chappell & L. Paul Sutton, *Evaluating the Effectiveness of Programs to Compensate Victims of Crime*, in Victimology: A New Focus 207 (Israel Drapkin & Emilio Viano eds. 1974) (noting growth of victim compensation programs).

114. *See* Keeton, *supra* note 95, §§ 9, 10.

115. *See supra* notes 46-48 and accompanying text (on rape victims who sue).

116. 30 Am. Jur. 2d *Evidence* § 1170 (1967).

117. *Id.* § 1163.

criminal trial. When a criminal defendant has been convicted, evidence of that judgment *will* be admissible in a subsequent civil trial.[118] If the defendant has been acquitted, however, the question remains whether the civil defendant, the victim, will be allowed to litigate the issue of the attacker's guilt. In one of the Michigan defamation cases, the judge stated in dicta that a dismissal of criminal charges was not dispositive of the defendant's culpability; it "merely indicated there was not sufficient evidence to allow the charges of criminal sexual conduct to proceed to the jury."[119] This suggests that the rape charge might have to be litigated fully a second time at the civil trial.

This last point raises an array of questions concerning litigation of a defamation suit against a rape victim. Recall the structure of defamation at common law: evidence of a false accusation of a crime involving moral turpitude is actionable *per se*, without even a need to prove damages.[120] Although such common law defamation actions are rare, the case law has not changed. Thus, the man may be able simply to submit evidence of a woman's accusations and of his acquittal, move for summary judgment on the defamation issue, and submit the evidence to the jury to determine damages. This is outrageous! What woman would file a rape charge, especially in an acquaintance rape, when she knows that an acquittal—or worse, a decision by the state not to prosecute—could result in a verdict against *her*?

One bar to this scenario may exist where a victim's reports to the police qualify as privileged communications. Some jurisdictions have limited absolute privilege to communications made in legislative and judicial proceedings and communications by military and naval officers.[121] "Federal law recognizes a public policy that individuals must be encouraged to pursue complaint and

118. Fed. R. Evid. 803(22) (exception to hearsay rule for "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment . . . .").

119. Rosenboom v. Vanek, Opinion and Order Granting Defendant[s'] Motion[s] for Summary Disposition, No. 87-34091-CZ, at 2 (Washtenaw County Cir. Ct. Mich. Aug. 12, 1988).

120. *See supra* notes 95-103 and accompanying text (on elements of common law defamation).

121. Rosenboom v. Vanek, Opinion and Order Granting Defendant[s'] Motion[s] for Summary Disposition, No. 87-34091-CZ, at 3 (Washtenaw County Cir. Ct. Mich. Aug. 12, 1988). Witnesses in judicial proceedings are absolutely immune from suit based on their testimony. Bruce v. Byrne-Stevens & Assocs. Eng'rs, 776 P.2d 666, 667 (Wash. 1989). The purpose of the rule is to encourage full and frank testimony. *Id.* Immunity has been extended as well to witnesses before grand juries and to witnesses in other pre-trial proceedings. *Id.* at 667-68 (citing Macko v. Byron, 760 F.2d 95 (6th Cir. 1985); Holt v. Castaneda, 832 F.2d 1123 (9th Cir. 1987)).

grievance procedures in cases of suspected sexual discrimination, harassment, and intimidation."[122] There is a trend toward absolute privilege for rape complaints.[123] This could prevent defamation suits except where the victim takes her story to the media.

In the alternative, the trial judge might order a trial on the issue of whether a rape occurred, or depart from the common law and rule that the plaintiff must prove damages. In that case, the woman would escape an adverse judgment on the pleadings but would still be forced to endure a second legal proceeding questioning the veracity of her rape charge. She has no way of avoiding the second suit. When a woman files a rape complaint, she must be prepared for the rigors of two suits and the cost of defending herself in a civil suit.[124] Further, if a jury favored the defendant in the criminal trial, it bodes ill for the civil trial: the experience might coerce the woman into a costly settlement, rather than risk an unsympathetic jury. The message is clear: poor women must think twice before reporting rape to the police. Other women can take their chances, depending how much they "value" justice.

One other bar to the defamation suit exists: the prohibition against lawyers filing frivolous suits, recognized in federal law and urged by the Code of Professional Responsibility.[125] It is improbable, however, that those in a position to exercise such sanctions

---

122. Rosenboom v. Vanek, Opinion and Order Granting Defendant[s'] Motion[s] for Summary Disposition, No. 87-34091-CZ, at 3 (Washtenaw County Cir. Ct. Mich. Aug. 12, 1988).

123. *See id.*

124. Costs, of course, vary with each case. One study found that even though 80-95% of the cases filed in federal district courts are settled before trial, the average expense per case is still $1,740. Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 Md. L. Rev. 40, 47 (1986). The government cost alone for processing an average jury trial in federal court was estimated at more than $10,000. *Id.* (Most tort claims such as defamation arise in state courts.) Although cost may be difficult to estimate, it is a function of time; the average disposition time for a tort case ranges between one and four years. *Id.* at 45.

125. "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C.A. § 1927 (West Supp. 1988).

> In his [sic] representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his [sic] client when he [sic] knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Model Code of Professional Responsibility DR 7-102(A) (1980). Disciplinary Rules "are mandatory in character." Model Code of Professional Responsibility Preliminary Statement (1980). The Code also suggests "[t]he duty of a lawyer to represent his [sic] client with zeal does not militate against his [sic] concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." Model Code of Professional Responsibility EC 7-10

would do so. Judges rarely impose sanctions and many may sympathize more with the criminal defendant than the rape victim.[126] Even the federal statute stops short of providing a real solution; it designates only monetary, not criminal, penalties for violation.

B. Discovery

In the legal world, "discovery" is the fact-finding process conducted by the parties to a suit in preparation for trial. Discovery in civil suits aspires to a thorough investigation of every relevant aspect of the suit. It serves to hone the issues so that only specific controversies are presented for the court to resolve. Criminal discovery, as handed down through the centuries, is somewhat limited. The differences in preparing for the two types of trials hold significant challenges for a rape victim defending a defamation suit.

Usually, a rape victim will have little contact with the criminal discovery process. The law in every jurisdiction limits criminal discovery.[127] Some of these limits inhere in the criminal process. The accused, often represented by assigned counsel or a public defender, may have no means by which to conduct discovery. Pretrial custody may simply bar the defendant from fact-gathering.[128] On the prosecution side, the police usually arrive first at the scene of a crime and take possession of most of the physical evidence.[129] The state, well equipped with scientific detection apparatus and trained investigators, has the ability to construct its case and thus

---

(1980). The Model Rules of Professional Conduct, more recently promulgated, also prohibit frivolous claims. Model Rules of Professional Conduct Rule 3.1 (1983).

Under Rule 11 of the Federal Rules of Civil Procedure, a judge may monetarily sanction an attorney who signs a pleading which would serve only "to harass or to cause . . . needless increase in the cost of litigation." Fed. R. Civ. P. 11 (1989). Several states, such as Minnesota, have adopted this rule for state court practice. *See, e.g.*, Minn. R. Civ. P. 11 (1989).

A survey of common law, rule, and statutory remedies for bringing frivolous lawsuits can be found in John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available?*, 36 Ala. L. Rev. 927 (1985). Ironically, the authors rely on malicious prosecution and defamation actions as two means of combating frivolous suits. *Id.* at 932, 941.

126. *See supra* notes 57-58, 77-81 and accompanying text (stating numbers of women judges and legislators and reporting the heinous attitudes of some judges).

127. Forty states and the federal government have adopted statutes or court rules governing discovery by criminal defendants; ten states have developed common law standards. Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, Modern Criminal Procedure 1114-15 (6th ed. 1986).

128. Especially in light of United States v. Salerno, 481 U.S. 739 (1987), where the court held that some arrestees may be held without bail (upholding the constitutionality of the Bail Reform Act).

129. Sanford H. Kadish & Conrad G. Paulsen, Criminal Law and Its Processes 1156-57 (2d ed. 1969).

carries the burden of going forward with the evidence.[130] In addition to this heavy burden of proof, Learned Hand once observed:

> Under our criminal procedure the accused has every advantage. . . . He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.[131]

Another argument maintains that because a criminal charge places a defendant's liberty at risk, discovery would not lead "to honest fact-finding, but on the contrary to perjury and the suppression of evidence" by a defendant attempting to set up a false defense and avoid punishment.[132] The defendant might also try to bribe and harass witnesses if the prosecution were forced to reveal those names before trial.[133] As a result of these countervailing forces, only a few jurisdictions authorize the use of depositions for discovery purposes in criminal trials.[134] Although criminal discovery has expanded in the wake of liberal discussions of the 1960s,[135] the American Bar Association rejected the proposal that defendants have the right to take depositions, for many of the reasons outlined above.[136] Many jurisdictions satisfy the defendant's need for discovery by requiring the prosecution to disclose the prior recorded statements of its witnesses.[137] Thus, in criminal trial prep-

130. Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 726 (1985).

131. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

132. State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953). *See also* LaFave & Israel, *supra* note 130, at 727.

133. People v. DiCarlo, 161 Misc. 484, 486, 292 N.Y.S. 252, 254 (Sup. Ct. 1936); *see also* LaFave & Israel, *supra* note 130, at 728.

Even if the defendant does obtain the witness' name, the Rules of Criminal Procedure provide for protective orders much like those in civil discovery, discussed below. *See* Fed. R. Crim. P. 16(d)(1).

134. Kamisar, LaFave & Israel, *supra* note 127, at 1124. Even in these jurisdictions, the defendant must show that the person to be deposed is a " 'material witness' and 'is not likely to be able to attend the trial.' " *Id.* at 1124 n.f.

135. LaFave & Israel, *supra* note 130, at 725-29 (noting the importance of and discussing the debate over the scope of defense discovery). *See generally* Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228 (1964) (attacking the surprise tactics and secrecy of prosecutors during criminal discovery); William Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279 (1963) (advocating expansive discovery privileges for criminal defendants).

136. Kamisar, LaFave & Israel, *supra* note 127, at 1124-25.

137. *Id.* at 1120-21. Even here, a third of all jurisdictions *prohibit* pre-trial discovery of witness statements. *Id.* The Supreme Court has upheld at least one federal restriction on pre-trial discovery in favor of the defendant. Palermo v. United States, 360 U.S. 343, 349 (1959) (upholding the Jencks Act, which exempts statements of government witnesses from discovery or inspection until after the witness has testified). *See* 18 U.S.C. § 3500 (1985) (Jencks Act).

aration, rape victims largely have been spared the intrusions of the discovery and deposition process.

Civil discovery presents an entirely different scenario: it aims to uncover all the relevant facts in a suit and to allow both sides access to that information, so that only the narrowest issues need be reserved for trial.[138] The Federal Rules of Civil Procedure state:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[139]

The Supreme Court strengthened this rule in 1947, announcing that the "deposition-discovery rules are to be accorded a broad and liberal treatment."[140] A rape victim in a civil suit could be deposed on any issue remotely relevant to the case: sexual history, past relationships, social activities, and other personal habits. The deposition, with its concurrent embarrassing and harassing effects, could last for days; all the while, the rape victim would have no idea whether the information would be used at a public trial.[141]

Discovery, however, should not become a runaway train. Upon motion to the court, the Federal Rules of Civil Procedure provide for protective orders for any party to prevent annoyance, embarrassment, oppression, or undue burden or expense.[142] The remedies include cessation of discovery, restricted terms of discovery, change of discovery method, blacking out of certain matters, eliminating unnecessary observers, and the sealing of depositions, to be opened only by the court.[143] Monetary sanctions can be ordered for violating a court discovery order, but the rules provide

138. Hickman v. Taylor, 329 U.S. 495, 501 (1947).

139. Fed. R. Civ. P. 26(b). The federal government adopted the Federal Rules of Civil Procedure in 1938, and a majority of states subsequently adopted them in whole or in part. *See* Maurice Rosenberg, Elements of Civil Procedure 84 (4th ed. 1985).

140. *Hickman*, 329 U.S. at 507 ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

141. It should be noted that the plaintiff in the civil suit will also be subject to discovery and has also been through or can expect to go through a criminal proceeding as well. While this may have a traumatic effect on the man, it must not be forgotten that he *chose* to file this suit and to expose himself to the rigors of discovery. A woman's choice—between remaining silent and submitting to two suits instead of one—is no choice at all.

142. Fed. R. Civ. P. 26(c).

143. *Id.*

only rough guidelines.[144] The generality of these rules can be resolved only by the trial court judge, to whose discretion appellate courts have left the decision of granting a protective order.[145] The judge's decision can be reversed only for an abuse of discretion, a tough standard that requires a showing of an erroneous conclusion of law or of no rational basis in evidence for the ruling. Most jurisdictions prohibit a reviewing court from substituting its own judgment for that of a trial court.[146]

In practice, courts rarely order that a deposition not be taken;[147] courts generally regard the request for such an order as unusual and unfavorable.[148] Unless the party can show that the opposing side is acting in bad faith or unethically,[149] the requesting party must satisfy strict criteria. The motion for a protective order must include "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements . . . ."[150] Protective orders which restrict dissemination to the public of discovered information, but which still allow discovery, must satisfy a higher standard. The order must also be "essential to shield a party from significant harm or to protect an important public in-

144. Fed. R. Civ. P. 37(b); Rjena K. Knowles & C. Robert Vote, *Limiting Discovery Through Protective Orders*, For the Defense, Jan. 1987, at 18, 23-24. Knowles and Vote give examples of sanctions that have been used: Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) ("[e]xtreme sanction of dismissal" imposed after plaintiff failed to answer crucial interrogatories for 17 months); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977) (court assessed costs and attorney fees against party that failed to answer court-ordered interrogatories within specified time); Hodgson v. Mahoney, 460 F.2d 326, 327 (1st Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972) (defendant jailed for contempt after ignoring court order to answer interrogatories and provide payroll records).

145. Knowles & Vote, *supra* note 144, at 18 (citing Stewart v. Winter, 669 F.2d 328, 331 (5th Cir. 1982); Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (the trial court has wide discretion in determining the scope and effect of discovery)).

146. Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436 (10th Cir. 1977) (reversing trial court's refusal to consider motion for a protective order where a substantial constitutional question was involved).

147. 4 James Wm. Moore, Jo Desha Lucas & George J. Grotheer, Jr., Moore's Federal Practice ¶ 26.69, at 26-443 (2d ed. 1989).

148. *See, e.g.*, Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (absent extraordinary circumstances an order prohibiting discovery would likely be in error); Investment Properties Int'l v. Ios, Ltd., 459 F.2d 705, 708 (2d Cir. 1972). *See also* 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2037 (1970 & Supp. 1988) [hereinafter Wright & Miller].

149. Hickman v. Taylor, 329 U.S. 495, 507-08 (1947).

150. 8 Wright & Miller, *supra* note 148, § 2035. Several state courts have noted that their state rules of civil procedure covering protective orders are so similar to the federal rule that they follow federal standards and precedents. *See* Truman v. Farmers & Merchants Bank, 375 S.E.2d 765, 768 (W. Va. 1988); Morris v. Craddock, 530 So. 2d 785, 787 (Ala. 1988).

terest."[151] To satisfy the "annoyance and embarrassment" exception, the party must demonstrate that the embarrassment will be particularly serious.[152] These standards are rather high. Women defending defamation suits, unable to point to specific incidents of embarrassment or mental distress before the deposition has taken place, will inevitably fail to satisfy these criteria, leaving them no shield from public revelations of their private affairs. Furthermore, courts developed these standards with respect to complex corporate litigation; they did not involve suits between individuals.[153] Since the needs of individuals differ from the needs of large corporations, especially with respect to privacy, the standards handed down often wreak injustice on personal parties.

After reviewing the parameters of civil discovery, one wonders whether the rules encourage truth finding or discourage individuals from becoming involved in the legal system. Civil discovery carries a presumption that nothing is sacred, a notion of a smoke-filled room where "you boys can go work this thing out on your own." It ignores any suggestion that some individuals need the protection of a watchful judicial eye. Discovery should be an adjudicative tool, not a retributive club. Presently, a rape victim would have a difficult time getting a protective order, especially considering the attitudes of some judges,[154] as well as the way society generally views women.[155] A person's self-worth should not be left to the discretion of a trial judge who is largely detached from pre-trial procedures. Discovery should have limits and well-constructed guidelines that anticipate and circumvent the harm the system can produce.

C. Character Evidence

Whether a defamation trial will become a public forum for the humiliation of a rape victim will depend on each court's discretionary interpretation of the rules concerning the admissibility of evidence relating to a person's character. Generally, a party would

151. Doe v. District of Columbia, 697 F.2d 1115, 1119 (D.C. Cir. 1983). The court, relying on an earlier holding, held the restraining order must be narrowly drawn and precise and that there must be no alternative means of protecting the public interest. *Id.* at 1120.

152. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986).

153. One court protected a *man* defending a sexual harassment suit from answering questions concerning his sexual activity. Boler v. Solano County Superior Court, 201 Cal. App. 3d 467, 247 Cal. Rptr. 185 (1987) (holding that discovery order was overly broad and impermissibly intruded on sexual privacy rights of defendant and his companions).

154. *See supra* notes 77-81 and accompanying text.

155. *See supra* notes 50-76 and accompanying text.

want to offer evidence of a person's character to persuade the fact-finder of that person's likelihood to perform the act in question. One would expect the opposing party to object to the evidence, arguing that past behavior spuriously correlates with other specific actions and would unfairly prejudice the fact-finder.

1. Backgound

The general rule prohibiting the admission of character evidence to prove conduct grew out of the desire at common law to protect defendants; courts applied the rule consistently and made exceptions only for criminal cases.[156] American courts expanded this exception in the nineteenth and early twentieth centuries to deal with increasing criminal case loads.[157] This expansion, coupled with loopholes for evidence of habit[158] and reputation,[159] created the "grotesque structure" that Congress codified in the Federal Rules of Evidence.[160] Some critics have interpreted the rules as prohibiting character evidence *only* when the sole purpose is to prove conformity with conduct.[161] One could also argue that the rule only applies to criminal cases.[162] Although the common law and the codified rules of evidence prohibit prejudicial evidence, i.e., evidence that might tend to help resolve the issue at hand but that carries with it an unacceptably high emotional impact,[163] the rule seems to have been used little to protect crime victims. As discussed below, the protective intent of the rule has been usurped.

The common law rules of evidence were codified at the federal level in 1975 and in many states in the same period.[164] The

156. 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5232, at 342-44 (1978 & Supp. 1989) [hereinafter 22 Wright & Graham].

157. *Id.*

158. *See* Fed. R. Evid. 406 (Use of evidence of habit is relevant to prove that the conduct of the person on a particular occasion was in conformity with that habit.).

159. *See* Fed. R. Evid. 608.

160. 22 Wright & Graham, *supra* note 156, § 5232, at 345 nn.39-44.

161. *Id.*

162. Subparagraphs 404(a)(1) and 404(a)(2) use the words "accused," "victim," "prosecution," etc., without using a proviso such as "in criminal cases." Similarly, 404(b) uses the words "motive," "intent," and "absence of mistake or accident," all common criminal law terms of art. This suggests that the drafters of the rule thought it would apply to criminal cases and hence felt no need to clarify that point.

163. Fed. R. Evid. 403.

164. California and Michigan adopted statutes in mid-1974. By the end of 1975, at least thirteen states had similar legislation. 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5381, at 380 n.2 (1980) [hereinafter 23 Wright & Graham]. By the time Congress passed the statute in 1978, more than half the states had adopted rape reform legislation. *Id.* § 5382.

rules of character evidence, both at common law and civil law, have been described as confused and muddied at best.[165] "Character" has never been defined conclusively and is used in the rules to indicate several different types of information.[166] For rape victims, character evidence rules historically meant that evidence of a woman's past sexual experiences could be admitted into evidence in an attempt to prove that the victim was "the type of person" who would have consented to the rape or assault at issue. This not only created a painful ordeal for the rape victim, but grossly prejudiced the jury against her complaint. Although rape shield laws tried to abolish that practice,[167] victims may now face the same problems in civil suits.[168]

The rape shield laws enacted in the late 1970s attempted to override the effect of the character evidence rule on rape victims testifying in the criminal trials of their attackers. Feminist groups around the country had startling success in passing new laws: the federal government and all but two of the states now have rape shield statutes.[169] The statutes range from the very restrictive Michigan model, which prohibits almost all sexual conduct evidence except for a few enumerated exceptions, to the rather permissive Texas model statutes, which allow the judge great discretion in deciding whether to admit sexual conduct evidence and which in reality do not differ substantially from the common law approach.[170] As a whole, the range of legislation has failed to provide a workable solution to the problems rape victims face in

165. United States v. Michelson, 335 U.S. 469, 474 n.5 (1948); *see also* 22 Wright & Graham, *supra* note 156, § 5233.

166. Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 Hofstra L. Rev. 7, 18-20 (1976). Younger proposes using the word "character" to indicate the type of life a person has led (a "good life" or a "bad life") and using the word "credibility" when determining the extent to which a witness seems to be telling the truth. "Reputation" would be used where "character" presently does not fall into one of the two former categories. The words should be exclusive of each other. *Id.*

167. President Carter acknowledged this goal when he signed the federal rape shield bill into law. 23 Wright & Graham, *supra* note 164, § 5382, at 494.

168. As originally proposed, the federal rule would have covered both criminal and civil suits. *Id.* § 5383, at 531 nn.2, 3 ("[sexual history evidence prohibited] in any trial if an issue in such trial is whether such person was raped or assaulted with intent to commit rape"). If this wording actually had been used it would have preempted many of the questions raised below on the use of character evidence in civil defamation trials.

169. Galvin, *supra* note 11, at 763, 765 n.3. The one state without any rape shield provision is Utah; Arizona restricts sexual conduct evidence by judicial decision.

170. *Id.* at 773-74. Galvin outlines four variations of rape shield statutes in great detail, noting their strengths and weaknesses. *Id.* at 871-76 (Michigan model), 882-83 (Texas model), 893 (federal model), 902 (California model).

court.[171]

This failure is most noticeable on the theoretical level. Numerous states either allow evidence of past sexual behavior with the defendant or recognize a marital rape exception, or both.[172] As the old saw goes, if a woman consented before, she probably consented this time, too.[173] Many of the other exceptions to the rape shield laws now in force are derivatives of the popular conventions that "no means yes" and that women lie to "get" men.[174] Even though the rape shield statutes have protected many women, their intent has been so mangled by the legislatures and the courts as to render them ineffective in dispelling stereotypes and taking the trial burden off the victim.[175]

2. Interpretation and Application

Federal Rule of Evidence[176] 404(a) provides a general prohibition on the use of evidence of a person's character or a trait of character for the purpose of proving the likelihood that the individual performed a particular action on a particular occasion.[177] The rule provides exceptions in *criminal* trials to show a pertinent character trait of an accused, a victim, or a witness,[178] and allows evidence of other acts to prove "motive, opportunity, intent, prepa-

171. *Id.* at 773-77; *see* Berger, *supra* note 83, at 69-72; *but see* Caringella-MacDonald, *supra* note 10, at 219 (attempt to limit character evidence admissibility in Michigan appears to have been successful, as indicated by reading case files).

172. All states allow evidence of prior sexual experience with the defendant (although many require an admissibility hearing depending on the purpose for which the evidence is intended); the statutes of eighteen states specifically contain a marital rape exception. Searles & Berger, *supra* note 41, at 33, 36.

173. Linda A. Purdy, *Rape: Adding Insult to Injury*, 11 Vt. L. Rev. 361, 364-65, 369 (1986).

174. Galvin, *supra* note 11, at 773.

175. *Id.* at 773-76.

176. The discussion here will focus on the Federal Rules of Evidence. Codified in 1975, a number of states have adopted them. While rape shield laws tend to differ from state to state, the basic rule of character evidence remains largely the same.

177. "Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Fed. R. Evid. 404(a).

178. (1) Character of accused. Evidence of a pertinent trait of . . . character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608 and 609.

Fed. R. Evid. 404(a).

ration, plan, knowledge, identity, or absence of mistake or accident."[179] Interpretation of the character evidence rules for a civil defamation suit can be compared to Rubik's Cube™: one can find millions of variations, and the solution requires a patient mind and an unemployed body.[180] Generally, evidence of character to prove conduct may not be admitted in civil trials.[181] However, authorities on evidence note that the rule does not apply to civil suits where "character is in issue," that is, where "character has been put in issue by the pleadings."[182] One can further discern that in a defamation suit, the plaintiff's character will be one of the issues.[183] Courts will admit character evidence offered by an opposing party in rebuttal if one party brings up the subject of character.[184]

This set of rules suggests two hypotheticals for the admissibility of character evidence in a civil defamation suit. First, if a woman wished to testify about her own good character, i.e., a person who would not defame another, the plaintiff would presumably have an invitation to introduce any other negative character evidence available. Even if this scenario were correct, the testimony should be subject to limitation by the prejudicial evidence rule.[185] The judge may—and should—exercise her or his discretion in admitting evidence and in controlling outrageous cross-examination.[186]

Second, one can speculate that when litigation in a defama-

---

179. (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show [action] in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
Fed. R. Evid. 404(b).

180. Unfortunately, one cannot send $4.95 and a self-addressed stamped envelope to get the solution.

181. 22 Wright & Graham, *supra* note 156, §§ 5232, 5234.

182. Edward W. Cleary, McCormick on Evidence § 187, at 551-52 (3rd ed. 1984); *see also* Continental Casualty Co. v. Howard, 775 F.2d 876, 879 n.1 (7th Cir. 1985) (citing Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969) (character evidence about the defendant inadmissible in a suit based on fraud because character was not one of the issues of the offense), *cert. denied*, 475 U.S. 1122 (1986)).

183. Cleary, *supra* note 182, § 187, at 551 (citing Weider v. Hoffman, 238 F. Supp. 437, 443 (M.D. Pa. 1965)).

184. 22 Wright & Graham, *supra* note 156, § 5236. In yet another bit of confusion, some consider the accused to have "put character in issue" by introducing evidence of his or her good character (which is always admissible) at a criminal trial. This is inaccurate because the defendant's character is not an ultimate issue in the case. *Id.*

185. Fed. R. Evid. 403.

186. Cohn v. Papke, 655 F.2d 191 (9th Cir. 1981) (Balancing required under rule of evidence permitting relevant evidence to be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or mis-

tion suit turns to the plaintiff's character (which has been put in issue by the pleadings for defamation), the plaintiff might attempt to offer evidence about the defendant's character. A plaintiff would seek to compare characters of the two parties in the community and to expose how disgracefully this woman maligned his good name. This is a cynical example: one would hope that any self-respecting judge, who cared at all about reversal on appeal, would strike down an attempt to slide malicious character evidence into the record in this manner. The example, however, illustrates the imprecision of character evidence rules and the potential for their abuse.

Even if the defendant's character is not "in issue" in a defamation suit, there are other ways a plaintiff can introduce sexual history evidence. Several courts have held that where the issue in a civil case closely resembles a criminal issue, then Rule 404(a) should apply.[187] If that rule were to apply to a defamation suit for an accusation of rape, would the relevant rape shield law apply or would the exception to the character evidence rule—allowing sexual history testimony about the victim—apply? The decision may simply come down to the jurisdiction of the trial court, as some rape shield laws are a subsection of the state character evidence rule.[188]

If this tactic fails, a plaintiff could approach the evidence from the angle of Rule 404(b), which allows evidence of "other crimes, wrongs, or acts," not for the purpose of proving action in conformity with character, but "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, knowledge, identity, or absence of mistake or accident."[189] Rule 404(b) specifies its application to "the crime charged" but does not state that the rule applies only to defendants. If applicable to civil suits, sexual history evidence may be admissible to prove one of the "other" purposes, not directly related to the rape charge.

The plaintiff could also offer the evidence under a different rule: reputation evidence.[190] Although this might stretch the issue a bit far, it again illustrates that the lack of definition of the character evidence rules, combined with a common law cause of action,

---

leading jury is left to the discretion of trial judge and is not to be overturned unless there is abuse of such discretion.). *Id.* at 194.

187. Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253 (5th Cir. 1982) (citing Hackbart v. Cincinnati Bengal, Inc., 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979)).

188. For example, see Mich. R. Evid. 404(a)(3) (Character of Victim of Sexual Conduct Crime).

189. Fed. R. Evid. 404(b).

190. Fed. R. Evid. 608.

can produce some bizarre and harmful results. These rules are not simply a failure of drafting, they are a failure of sensitivity, a failure to recognize the pain and the fear of women thrown into the legal system wholly against their wills. This imaginative discussion of character evidence rules is not so much a request for legislation as it is a quest for awareness and creativity.

IV. Solutions

To remove defamation suits as a reporting deterrent to women who have been raped, the threatening value of such suits should be reduced to the point that only those men who legitimately have been wrongly accused of rape would want to bring such an action. One way to deter defamation suits would be to stay any action on the civil suit until the criminal matter has been adjudicated. This is, in fact, what judges did in the Michigan cases.[191] Several state representatives in Michigan drafted a bill that would have codified the judges' actions, but the bill died in committee during the 1988 legislative session.[192] An even better statute would prohibit a person from even *filing* a defamation action until the criminal justice system had finished with the matter.[193] The statute of limitations on the defamation suit could run from the day of the final appeal and order in the criminal action. At that point, the damaging effects of the accusation would either be demonstrable or nonexistent.

The postponement solution would not only remove the wo-

191. Telephone interview with Julie Steiner, coordinator at University of Michigan's Sexual Assault Prevention and Awareness Center, Ann Arbor, Michigan (Oct. 6, 1988).

192. Mich. H. R. 5760, 84th Leg. (1988). In pertinent part, the proposed legislation provided:

> A defendant in a criminal action for criminal sexual conduct . . . shall not commence a civil action against a victim of the crime . . . [if]: (A) The criminal action is pending in a trial court . . . [and] (B) The civil action is based upon statements or reports with reference to an incident from which the criminal action is derived. . . . The period of limitations for the bringing of a civil action described [above] is tolled for the period of time during which the criminal action is pending in a trial court.

Id.

193. This would require a statute providing that defamation suits be dismissed if filed before criminal proceedings had ended, and a fine assessed against the filing party, to be awarded to the defendant/victim. Without the fine, not only would a suit be used as an initial threat, but in states such as Minnesota, where a lawsuit is initiated by service of a summons and complaint, not filing, there is even less incentive to refrain from starting a lawsuit, since the complaint never need become public. *See* Minn. R. Civ. P. 3.01 (commencement of an action); Minn. Stat. § 333.06 (1988) (providing $250 in costs be awarded to prevailing party where opposing party commenced a civil action using an unregistered trade name).

man's initial fear but also resolve the discovery problems discussed. It does not, however, address the absurd possibility that an acquitted defendant could "automatically" win a defamation suit just by showing that an accusation had been made. The cause of action for defamation should be amended by law to allow evidence by the woman that some form of forcible, or at least extraordinary, sexual conduct occurred. The man should be required to prove that his reputation suffered some sort of damage and not simply be allowed to submit the issue on its face to the jury.

Despite a decade and a half of reforming the rules for admitting character evidence, the legal world refuses to abandon the notion that once a woman consents to sexual intercourse, she gives up her right to say "no" in the future. The issue of consent should be limited only to the instance of the alleged rape for criminal and, if applicable, civil trials. At the very least, attorneys should be required initially to present all character evidence to the judge without the jury present. The judge could then weigh the value of the evidence as a whole, not piece by piece on cross-examination.[194] Legislatures should also define the meaning of "character" and "character in issue" so that character evidence concerning a rape victim cannot be admitted where it is completely inappropriate.

Rape should be treated with the seriousness it deserves, not left to flounder amid conflicting theories of civil and criminal law and procedure. Laws are intended to be a means toward a specific end: justice. Laws, rules, procedures, and systems which fail to advance that end must be reformed or abolished. The possibility that rape victims may be deterred from reporting rape by the threat of defamation suits by their attackers is a gaping loophole in our laws. In this case the failure to close that loophole not only reflects a lack of justice, it reflects the unending suffering of half of our population, and the callousness of the other half.

194. This suggestion parallels the "Michigan approach" to criminal rape shield statutes outlined by Prof. Galvin, *supra* note 11, at 871-73. I do not think Galvin's misgivings, concerning the statutes' tendency to restrict the right of the accused to present relevant evidence, apply in the context of civil defamation suits. *Cf. id.* at 872.