

# BRACING THE ARMOR: EXTENDING RAPE SHIELD PROTECTIONS TO CIVIL PROCEEDINGS

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## INTRODUCTION

As a society we look to punish rape offenders harshly. But doing so is only part of the story. While every victim's experience is different, a common narrative emerges. Months after the event, a rape victim's attacker is on trial. The defense seeks to introduce witness testimony that she<sup>1</sup> has had several previous sexual partners, was seen dancing provocatively at a bar that night, and kissed another man the same evening. Under the state's rules of evidence, the testimony is presumptively excluded, and the attacker is convicted. He goes to jail, but that is not the end of the story. The victim finds her life in shambles. After leaving the hospital, she is unable to sleep for months, always reliving the event in her mind. She is unable to work because she is constantly exhausted and cannot focus. She loses her job. She looks to her partner for support, but he leaves her when they find out she has contracted a sexually transmitted disease from her attacker. She finds herself without a job, without a home, and without a way to pay for treatment.

Seeking justice, she sues her attacker for compensatory damages. But this time, the defense is allowed to broadly probe her personal life. During discovery she is compelled to disclose the number of sex-

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1 While men are also the victims of sexual assault, this Note uses female identifiers throughout this piece because sexual assault victims are overwhelmingly female. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 22777, BULLETIN: CRIMINAL VICTIMIZATION, 2008, at 5 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf> (charting the 2008 National Crime Victimization Survey and showing that there were 164,240 female victims of sexual assault and 39,590 male victims).

ual partners she has had and the intimate details of her relationships. At trial, the defense introduces these details, including evidence that she has been the victim of previous sexual abuse, and argues that the injury caused by her attacker is less than she claims because of her previous experience. The defense also seeks to introduce the same witness testimony excluded in the criminal trial. Her attorney objects, but the court finds that the bar for relevance is low and that her previous consent with others makes her consent more likely with her attacker. It further finds that any mental injury caused by her previous abuse is relevant to reduce her recovery for mental injury caused by her attacker. This is the plight of rape victims in many states' civil courts.

The Supreme Court of Nevada recently held that, unlike its federal counterpart,<sup>2</sup> Nevada's rape shield statute<sup>3</sup> applies only to criminal proceedings.<sup>4</sup> However, the court also limited discovery of a civil plaintiff's sexual past by stressing the analysis under Nevada's equivalent of Federal Rule of Civil Procedure 26(c)(1), providing that a court may issue protective orders to prevent "annoyance, embarrassment, oppression, or undue burden or expense[ ]."<sup>5</sup> By doing so, the court implicitly recognized that the embarrassment of having to disclose irrelevant and prejudicial details of one's personal life can hinder not only criminal prosecutions, but legitimate civil actions as well.

This recognition highlights the important purpose of rape shield laws: the encouragement of reporting by preventing embarrassment and the prevention of reliance on misconceived notions about sexual misconduct.<sup>6</sup> In furtherance of this purpose, the federal government and almost all states<sup>7</sup> have some form of evidentiary protection for rape victims in criminal proceedings, but only a few jurisdictions have adopted protections for civil plaintiffs.<sup>8</sup>

This Note argues that the purpose of rape shield statutes requires that protections be extended beyond just criminal complainants and

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2 See FED. R. EVID. 412(b)(2).

3 NEV. REV. STAT. § 50.090 (2009). "Rape shields" are rules of evidence excluding testimony about the complainant's sexual history or propensity.

4 See *Sonia F. v. Eighth Judicial Dist. Court*, 215 P.3d 705, 708 (Nev. 2009).

5 NEV. R. CIV. P. 26(c), construed in *Sonia F.*, 215 P.3d at 709; see also FED. R. CIV. P. 26(c)(1) (comprising the federal equivalent to the Nevada rule).

6 By using the term "sexual misconduct" interchangeably with the word "rape" and "sexual assault" throughout this Note, I do not mean to employ a euphemism and thereby diminish the seriousness conveyed by the word "rape." Rather, I seek to use a more inclusive term that encompasses both criminal sexual behavior and sexual behavior that is not criminal under current law.

7 Only Arizona has no rape shield protection.

8 See, e.g., HAW. R. EVID. 412(d).

applied in the context of civil actions. Criminal prosecutions often provide inadequate redress for victims, even when successful. Civil actions, on the other hand, provide a variety of advantages for victims that can, to the extent possible, help compensate them for the unique damages they suffer from rape and from other sexual misconduct. Extending rape shields furthers the goal of holding offenders responsible for sexual misconduct by encouraging reporting and preventing a defendant's reliance on myths embraced by courts and juries to escape responsibility.

Part I of this Note provides a brief overview of the history of rape law in America and the myths and cultural biases pursuant to which evidence of prior sexual history was freely admitted in rape prosecutions. It then discusses the reasoning and policy goals behind the original passage of rape shield statutes, first in the criminal context, and then extending the federal rules to civil proceedings as well. Part II highlights the specialized injuries suffered by rape victims and the limited ability of criminal law to adequately remedy such injuries. It then points out the significant opportunities provided by civil actions not only for rape victims to seek monetary or injunctive relief, but also to complement the retributive goals of criminal law. Part III points out that civil proceedings are as susceptible to infection by rape myths as criminal proceedings, and the absence of rape shields potentially deters victims from seeking redress. It then points to specific examples of cases infected by traditional rape myths through the admission of evidence of previous sexual history. I argue that subject to exceptions, such history should be considered irrelevant to the issue of liability and the calculation of damages. I conclude that in civil proceedings states should prevent defendants from using evidence of sexual history to embarrass victims or invoke rape myths that confuse and prejudice jurors and undermine the goals of tort law.

#### I. MYTHS AND CULTURAL BIASES IN RAPE JURISPRUDENCE: THE HISTORICAL CONTEXT OF RAPE SHIELDS

Prior to the introduction of rape shield laws, evidence of sexual history and predisposition was not only freely admissible, but encouraged.<sup>9</sup> The rationale used for the admissibility of such evidence reflects traditional rape myths that persist today. First,

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9 See Josh Maggard, Note, *Courting Disaster: Re-Evaluating Rape Shields in Light of People v. Bryant*, 66 OHIO ST. L.J. 1341, 1348 (2005) (noting the requirement that prosecutors provide evidence of a victim's chastity and explicitly challenge defendants to disprove it); see also *Commonwealth v. Bonomo*, 144 A.2d 752, 755-56 (Pa. Super. Ct. 1958) (citing a Pennsylvania statute providing an affirmative defense to statutory

pre-rape shield courts admitted evidence of sexual history to impeach a witness's credibility on the theory that a witness with "bad moral character" will be less truthful than one with "good moral character."<sup>10</sup> Second, courts considered evidence of sexual history to be probative on issues of consent.<sup>11</sup>

The idea that sexual propensity bears on credibility and consent is grounded in cultural attitudes and myths about sexual conduct, the crime of rape, and rape victims.<sup>12</sup> For example, the perception of evidence in rape cases is affected by the degree to which the facts conform to the "ideal" rape case. The stereotype of an "ideal" rape victim involves a virtuous virgin, acting cautiously by remaining where she is "supposed" to be, who is suddenly ambushed by a crazed stranger.<sup>13</sup> This ideal reflects several prevailing notions about women in society. First, that only sex within heterosexual marriage is morally acceptable.<sup>14</sup> If a woman cohabitates with a man prior to marriage or engages in premarital sex, she lacks moral character and is thus more likely to consent to any particular encounter with anyone or to lie about the encounter after the fact. Second, it reflects the tendency to blame victims for precipitating the attack, or "asking for it."<sup>15</sup> If a woman dresses provocatively, flirts excessively, or keeps late hours in places where she is not "supposed" to be, either she is culpable and thus less credible or she constructively consented. Third, the "ideal victim" stereotype is partly derived from a longstanding common law notion of women as property.<sup>16</sup> A virgin was traditionally considered

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rape when the "child was not of good repute" and "the carnal knowledge was with her consent").

10 See *Anderson v. State*, 4 N.E. 63, 65 (Ind. 1885); see also *People v. Bell*, 274 P. 393, 395 (Cal. Dist. Ct. App. 1929) (holding that defendant should have "the widest latitude" to test the credibility and chastity of a prosecutrix).

11 See, e.g., *State v. Henderson*, 139 A.2d 515, 518 (Me. 1958) ("Evidence of general reputation in the community for unchastity is admissible for the purpose of impeaching the prosecuting witness as to want of consent . . .").

12 While the characteristics of the victim are not the only factors that play a role in the predispositions of courts and juries in rape cases, this Note addresses only the evidentiary issues targeted by rape shield laws, which focus on evidence involving the complainant's sexual history. For a discussion of empirical studies addressing other stereotypes surrounding rape cases, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997).

13 See Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1587 (2007).

14 MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 218 (1999).

15 See Orenstein, *supra* note 13, at 1588.

16 See Maggard, *supra* note 9, at 1349 (discussing the rationale for criminalizing rape as one of protecting against damage to property, rather than protecting a woman's autonomy); see also Christina E. Wells & Erin Elliott Motley, *Reinforcing the*

“a prize to be won,”<sup>17</sup> while unmarried nonvirgins were “sullied property”<sup>18</sup> and thus entitled to less protection in the eyes of the law. While not explicitly categorizing women as property or legally requiring that victims be chaste in order to be protected, courts well into the twentieth century imposed a de facto chastity requirement by allowing defendants to introduce evidence of sexual history and predisposition that implicated the “ideal victim” requirement.<sup>19</sup>

It is against this backdrop that women’s rights activists of the 1970s sought to prevent rape defendants from introducing evidence of complainants’ past sexual histories. Beginning with Michigan in 1974,<sup>20</sup> almost every jurisdiction and the federal government had adopted some form of rape shield protection for criminal complainants by the early 1980s.<sup>21</sup> The drafters of Rule 412 of the Federal Rules of Evidence recognized the minimal probative value and prejudicial nature of sexual history evidence.<sup>22</sup>

The main concern for Congress was prohibiting inquiry into private sexual histories.<sup>23</sup> Former Representative Elizabeth Holtzman noted the problem of “humiliating cross-examination of [victims’] past sexual experiences and intimate personal histories.”<sup>24</sup> A second

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*Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 146 (2001) (noting an “underlying misogyny and a desire to protect male domination over women” that have hindered rape enforcement).

17 Maggard, *supra* note 9, at 1349.

18 *Id.*

19 See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 75–78 (2002) (discussing courts’ gradual shift away from applying sexual history evidence to issues of credibility and consent).

20 See MICH. COMP. LAWS ANN. § 750.520j (West 2004).

21 See Anderson, *supra* note 19, at 81.

22 See FED. R. EVID. 412 advisory committee’s note (“The rule aims to safeguard the alleged victim against . . . invasion of privacy, potential embarrassment and sexual stereotyping . . . and the infusion of sexual innuendo into the factfinding process.”).

23 States passing rape shields had similar motivation. See, e.g., *People v. Adair*, 550 N.W.2d 505, 509 (Mich. 1996) (noting that Michigan’s rape shield was aimed at practices that discouraged victims from testifying for fear of cross-examination about their private lives).

24 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman). While this concern was an important step in the right direction, by no means do rape shields solve the problem in every case. Statutory and judicial exceptions to the rules allowed the common law “ideal victim” stereotype to endure by failing to adequately protect the sexual pasts of women whose sexual conduct is more extensive or more public. See Anderson, *supra* note 19, at 93–94 (“An interest in protecting women’s sexual privacy . . . was not a rejection of the chastity requirement.”).

but equally important concern was preventing defendants from putting “the victim rather than the defendant . . . ‘on trial.’”<sup>25</sup>

The passage of rape shield statutes required balancing among several competing interests: a defendant has a constitutional right to present a defense and confront witnesses against him; a victim of sexual misconduct should be protected against undue harassment and embarrassment; and society benefits from rape victims coming forward to hold offenders responsible.<sup>26</sup> Because of these competing interests, all jurisdictions have developed exceptions to rape shield protections, either judicially or legislatively, that allow admission of evidence in certain circumstances. While some of these exceptions make sense and should be supported, such as allowing evidence of specific instances of sexual behavior to prove that a person other than the accused was the source of semen or injury,<sup>27</sup> other exceptions allow the “ideal victim” requirement to persist.<sup>28</sup> For example, five states have an exception for evidence of prior pattern sexual conduct with third parties,<sup>29</sup> allowing defendants to rely on the myth that prior consent to conduct with a third party makes consent to the conduct at issue more likely.

In 1994, Congress extended federal rape shield protections to civil plaintiffs.<sup>30</sup> The purposes articulated were essentially the same as the purpose for rape shield protection in criminal proceedings, namely to safeguard plaintiffs from the embarrassment of public disclosure of their sexual history and thereby encourage reporting.<sup>31</sup> Rule 412(b)(2) provides that in addition to any other limits on admissibility, evidence of sexual behavior or predisposition is admissible only if “its probative value substantially outweighs the danger of harm

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25 See *Privacy of Rape Victims: Hearing on H.R. 14666 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong. 51 (1976) (statement of Rep. Harris).

26 See 124 CONG. REC. 34,913 (1978); see also Lauren M. Hilsheimer, Note, *But She Spoke in an Un-Ladylike Fashion!: Parsing Through the Standards of Evidentiary Admissibility in Civil Lawsuits After the 1994 Amendments to the Rape Shield Law*, 70 OHIO ST. L.J. 661, 672 (2009) (noting the same balancing of interests).

27 See, e.g., FED. R. EVID. 412(b)(1)(A).

28 See generally Anderson, *supra* note 19, at 97–141 (discussing various problematic exceptions to criminal rape shields).

29 See FLA. STAT. § 794.022 (2007); MINN. STAT. § 609.347 (2008); NEB. REV. STAT. § 28-321 (1995); N.C. GEN. STAT. § 8C-1, R. 412 (1999); TENN. R. EVID. 412 (West 2000). Some of the statutes require a preliminary judicial determination that the proffered evidence establishes a pattern of behavior.

30 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141(b), 108 Stat. 1796, 1919.

31 See FED. R. EVID. 412 advisory committee’s note.

to any victim and of unfair prejudice to any party.”<sup>32</sup> Thus, as opposed to the normal balancing test provided by Federal Rule of Evidence 403, which requires the opponent to show that *danger of prejudice* substantially outweighs *probative value*,<sup>33</sup> when a party seeks to introduce prior sexual history evidence, Rule 412 shifts the burden to the proponent and requires a showing that *probative value* substantially outweighs *unfair prejudice*. Some states have adopted the same framework in extending their rape shield protections to civil proceedings.<sup>34</sup>

## II. COMPENSATION SHORTCOMINGS IN CRIMINAL PROSECUTIONS AND THE ADVANTAGES OF CIVIL ACTIONS

Using rape shields to encourage victims of sexual misconduct to come forward is an important means of prosecuting and punishing offenders. But taking rapists off the streets is only part of the story. Rape and sexual assault have serious consequences for victims which generally cannot be fully accounted for by the criminal system.

### A. Shortcomings of Criminal Justice

An obvious consequence of rape and sexual assault is physical injury. But contrary to popular belief,<sup>35</sup> studies show that “between one-half and two-thirds of rape victims sustain no physical injuries,” and that only four percent sustain serious physical injuries.<sup>36</sup> But the physical effects of rape extend far beyond immediate physical injury. There is also a high risk of disease transmission to the victim and of subsequent pregnancy.<sup>37</sup> The stress associated with sexual trauma can

32 FED. R. EVID. 412(b)(2).

33 See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .”).

34 See, e.g., KY. R. EVID. 412; ME. R. EVID. 412. However, Maine does not include the word “substantially” in its balancing test. But see HAW. R. EVID. 412(d) (excluding prior sexual history evidence in civil proceedings, but not providing for a balancing test).

35 See NAT’L RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 75–76 (Nancy A. Crowell & Ann W. Burgess eds., 1996) [hereinafter UNDERSTANDING VAW], available at [http://books.nap.edu/openbook.php?record\\_id=5127](http://books.nap.edu/openbook.php?record_id=5127) (noting that most women surveyed view “typical” rape as high risk for physical violence).

36 *Id.*; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 194530, SELECTED FINDINGS: RAPE AND SEXUAL ASSAULT 2 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsarp00.pdf> (reporting that from 1992–2000, thirty-nine percent of rape victims sustained an injury in addition to the rape and five percent sustained serious injury).

37 See UNDERSTANDING VAW, *supra* note 35, at 76 (noting that sexually transmitted diseases have been found in up to forty-three percent of rape victims, depending on diseases screened for).

cause various psychosomatic symptoms such as “skeletal muscle tension, gastrointestinal problems, and genitourinary disturbances.”<sup>38</sup> Sexual victimization has also been associated with a variety of chronic pain disorders including chronic pelvic pain, headaches, and back pain.<sup>39</sup>

The psychological consequences of rape are similar to those experienced by survivors of other trauma such as war and natural disaster.<sup>40</sup> Studies have shown that most rape victims develop psychiatric problems “such as fears, phobias, anxieties, increased motor activity, somatic symptoms, obsessions, depressive symptoms, and even suicidal ideation.”<sup>41</sup> Many victims have an increased fear of the area in which they live,<sup>42</sup> are unable to resume normal sexual patterns,<sup>43</sup> and experience feelings of shame and worthlessness.<sup>44</sup> Beyond the months immediately following an attack, many victims feel they have chronic psychological problems.<sup>45</sup>

Rape also has an indirect effect on other aspects of the victim’s life. “[R]ape victims who admit they were raped often suffer in their personal relationships because acquaintances, friends, and lovers sometimes withdraw, deny the incident, blame or disbelieve the victim, or even abandon the victim out of ignorance, anger, fear or hurt.”<sup>46</sup> In other cases, a mother might be seen as unfit because of the rape and have her child taken away.<sup>47</sup> Victims also suffer financial loss from medical expenses, loss of property, and loss of income due to the recovery period and subsequent participation in the reporting and courtroom process.<sup>48</sup> One estimate found that the cost of rape to

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38 Andrea Giampetro-Meyer et al., *Raped at Work: Just Another Slip, Twist, and Fall Case?*, 11 UCLA WOMEN’S L.J. 67, 90 (2000) (footnotes omitted) (citing Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, in FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 315, 319–20 (Duncan Chappell et al. eds., 1977)).

39 See UNDERSTANDING VAW, *supra* note 35, at 77.

40 *Id.* at 79.

41 SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM 217 (1979).

42 *Id.* at 218.

43 See *id.* at 219.

44 See *id.* at 221.

45 See *id.* at 227.

46 Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1030 (1991) (quoting Toni M. Masaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 422–23 (1985)).

47 See KATZ & MAZUR, *supra* note 41, at 226.

48 See *id.*

the average victim, including tangible and intangible losses, is around \$87,000.<sup>49</sup>

The criminal justice system provides poor compensation for the severe aftereffects of rape. First and foremost, only a small percentage of rape cases result in prosecution.<sup>50</sup> And even when prosecutions take place, conviction rates are low. One estimate found a rate of 11.3% for all stranger rape cases, and 2.5% for similar acquaintance rape cases.<sup>51</sup> In the United States, conviction rates for sexual assault are much lower than conviction rates for other violent crimes.<sup>52</sup> Thus, even when victims do come forward, there is only a small chance of conviction. Further, criminal laws prohibiting sexual misconduct are narrow. They provide some protection against physical violence, but do not adequately address other forms of coercion<sup>53</sup> such as economic threats.

Second, restitution is not a substitute for the tort system and does not generally cover damages for pain and suffering.<sup>54</sup> “When the victim’s loss is difficult to quantify, as in cases of murder or rape, restitution may be a less effective and less easily administered penalty than it is in cases of property crimes.”<sup>55</sup> While a victim may be able to recover restitution for any property damaged or stolen in the course of an attack—and possibly for medical expenses incurred—it is unlikely she will be able to recover for intangible damages traditionally contemplated by tort law.

Finally, convicted rapists will often be immune from any order of restitution. Studies have shown that both victims and offenders are often found among the poorest social groups.<sup>56</sup> Presumably, after being convicted of rape, offenders will not be generating income in the immediate future due to their impending incarceration. As such, restitution for sexual assault is potentially unavailable from offenders

49 See NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, NO. NCJ 155282, RESEARCH REPORT: VICTIM COSTS AND CONSEQUENCES 9 (1996), available at <http://www.ncjrs.gov/pdffiles/victcost.pdf>.

50 See Bryden & Lengnick, *supra* note 12, at 1244–52 (discussing a variety of reasons so few cases are prosecuted).

51 See LYNDA LYTLE HOLMSTROM & ANN WOLBERT BURGESS, *THE VICTIM OF RAPE* 247 (1978).

52 See JENNIFER TEMKIN & BARBARA KRAHÉ, *SEXUAL ASSAULT AND THE JUSTICE GAP* 23 (2008).

53 See STEPHEN J. SCHULHOFER, *UNWANTED SEX* 9 (1998).

54 See Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 *STAN. L. REV.* 937, 1007 (1985).

55 Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 *HARV. L. REV.* 931, 933 (1984).

56 See JOHN M. MACDONALD, *RAPE: OFFENDERS AND THEIR VICTIMS* 55 (1971).

themselves.<sup>57</sup> However, almost all states have designed victim restitution funds, for example by pooling money from small fines imposed for petty offenses.<sup>58</sup>

### B. *Advantages of Civil Actions for Rape*

Because rape and other forms of sexual misconduct cause unique damages to victims that are not easily remediable through the criminal justice system, civil actions provide an attractive alternative for a variety of reasons.<sup>59</sup>

First, tort law offers a broader definition of prohibited conduct. Only a few jurisdictions provide a cause of action specifically for sexual abuse,<sup>60</sup> which allows plaintiffs to pursue more generalized claims for relief such as battery.<sup>61</sup> Intentional and negligent torts have much less rigid conduct requirements that allow plaintiffs to prevail without “delv[ing] into insufferable details about exactly which digit touched which orifice in order to establish that a particular offense has been committed.”<sup>62</sup> Importantly, a victim can still prevail in tort regardless of how much physical force was used, so long as the aggressor had the requisite intent.<sup>63</sup> When the aggressor is an employer or coworker, relief is available for sexual harassment under Title VII.<sup>64</sup> Title VII allows recovery when a victim may have voluntarily submitted to sexual misconduct without consenting, for example when she is under threat of losing her job. Alternatively, malpractice claims allow recovery

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57 Further, imposing restitution only on well-to-do offenders may unfairly discriminate among victims based upon the status of their attacker.

58 See Henderson, *supra* note 54, at 1014–15.

59 This Note by no means seeks to undermine the importance of prosecuting sexual offenders. Tort law should not be a replacement for criminal punishment. Instead, tort law should serve as a complement to the social objectives of criminal punishment by advancing the normative objective of compensating victims.

60 See, e.g., N.J. STAT. ANN. § 2A:61B-1 (West 2005).

61 See *Ledbetter v. Concord Gen. Corp.*, 651 So. 2d 911, 916 (La. Ct. App. 1995) (“Although all batteries are not rapes, all rapes necessarily are batteries.” (quoting *Paul v. Montesino*, 535 So. 2d 6, 7 (La. Ct. App. 1988))), *amended in part, rev’d in part*, 665 So. 2d 1166 (La.), *amended by* 671 So. 2d 915 (La. 1996).

62 Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 72 (2006).

63 See *id.* at 73.

64 See 42 U.S.C. § 2000e-2(a)(1) (2006) (providing that it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”). However, a legal claim for sexual harassment did not emerge until the mid-1970s. See Hilsheimer, *supra* note 26, at 673 (summarizing the history of the Title VII claim).

against physicians and other medical practitioners who abuse the trust relationship to engage in sexual misconduct.<sup>65</sup>

Civil actions also provide victims with more control over the proceedings. In the criminal context, the government makes the ultimate decisions about how to prosecute a case. However, a tort plaintiff gains significant control over decisions such as settlement and the presentation of evidence.<sup>66</sup> Victims can also determine the type of remedy sought, which is especially important given that the damages suffered by rape victims are wide ranging and unique to each victim.<sup>67</sup> Through settlement negotiations, tort plaintiffs can pursue unique remedies such as having the defendant move away.<sup>68</sup> Civil actions also allow plaintiffs to control whom they sue, thus giving the benefit of pursuing assailants who escaped criminal prosecution.

Another major advantage of civil actions is the ability to recover against third parties who were not criminally liable but may be civilly responsible on a negligence or other theory. Because assailants themselves will often lack resources,<sup>69</sup> and insurance generally will not cover their intentional torts, the only money available to cover a plaintiff's losses may come from the insurance of landlords, universities, or employers.<sup>70</sup> This also has the side benefit of prompting such third parties to adopt measures designed to prevent future victimization.<sup>71</sup>

Perhaps the most important advantage of civil actions is significant procedural differences. In criminal rape cases, the prosecutors are required to prove every element of the crime beyond a reasonable doubt, and the defendant has the protection of the Confrontation Clause but is not required to testify. Conversely, civil plaintiffs need only prove their claims by a preponderance of the evidence, can compel discovery or testimony of the defendant, and have the evidentiary advantage of any concurrent criminal conviction or guilty plea.<sup>72</sup>

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65 See Bublick, *supra* note 62, at 72. However, Professor Bublick also cites a case denying a malpractice claim where a sexual assault did not require professional judgment. See *id.* at 72 n.104 (citing *Blier v. Greene*, 587 S.E.2d 190 (Ga. Ct. App. 2003)).

66 See Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1574 (2008) (discussing the various control advantages for civil litigants).

67 See *supra* notes 35–49 and accompanying text.

68 See Bublick, *supra* note 62, at 74.

69 See *supra* notes 56–57 and accompanying text.

70 One could argue that allowing some aggressors to escape liability because of indigence might impose disproportionate costs on well-to-do defendants. The most obvious response is that such well-to-do defendants could avoid these costs by not engaging in sexual misconduct.

71 See Lininger, *supra* note 66, at 1576.

72 See Bublick, *supra* note 62, at 69–70 (discussing procedural advantages for tort plaintiffs).

Acting as a significant complement to the limited protection that criminal law provides rape victims, civil actions represent a means of securing more acceptable levels of compensation for victims and a higher degree of responsibility for defendants. However, states must extend to the civil context the same concern for preventing embarrassment and harassment of victims that motivated the passage of rape shields in the criminal context. Otherwise, states risk missing an opportunity to further the broader social goals of encouraging reporting and of compensating victims.

### III. PROBLEMS FACED BY SEXUAL ASSAULT PLAINTIFFS IN THE ABSENCE OF RAPE SHIELDS

Given the advantages of civil proceedings, there has been a sharp increase in civil actions for rape and other sexual misconduct in the past five years.<sup>73</sup> But even with the advantages to victims provided by tort fora, it is no less important that details of a victim's sexual history not be allowed to confuse the issues in the minds of courts and juries, or to harass plaintiffs into dropping their meritorious claims. Certain aspects of civil actions make courts and juries particularly susceptible to cultural biases and make plaintiffs particularly susceptible to harassment by the defense. Further, an analysis of select civil cases alleging sexual misconduct indicates that in the absence of rape shield protection—and even where rape shields have been applied—courts continue to admit evidence of past sexual history that is largely irrelevant to the issues of liability and damages.<sup>74</sup>

#### A. *Civil Actions as a Conduit for Rape Myths*

Very few civil cases end in a jury verdict.<sup>75</sup> Most cases are settled, which means that the cases actually reaching the trial stage are closely contested with both sides presenting a persuasive case. It is in this context that defense attorneys are most likely to appeal to rape myths and cultural stereotypes of rape victims in order to sway jurors that are

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<sup>73</sup> See Lininger, *supra* note 66, at 1559 (noting that 2007 was a record year for such actions).

<sup>74</sup> Analyzing appellate case law involving the civil application of rape shields is somewhat easier than in the criminal context. Professor Anderson notes the difficulty of analyzing rape shield law in the criminal context because of the government's inability to appeal acquittals when evidence is improperly admitted. See Anderson, *supra* note 19, at 95.

<sup>75</sup> See SEAN G. OVERLAND, *THE JUROR FACTOR 13* (2009) (noting that in 1995, only 1.8% of federal civil cases ended in a jury verdict, which was similar to statistics from the previous fifteen years).

“on the fence.”<sup>76</sup> Allowing such stereotypes to creep into decision-making is an implicit endorsement of the idea that women deviating from the “ideal victim” are less deserving of the protection of the law.<sup>77</sup> In addition to attitudes about rape victims and rape cases specifically, jurors generally have a negative view of litigation and often see it as frivolous.<sup>78</sup> Courts and juries may be looking to “punish” the plaintiff for bringing the action in the first place, which is all the more reason to ensure that defendants not be permitted to use prior sexual history to invoke negative biases irrelevant to the issues at hand.

Further, the nature of civil actions leaves plaintiffs particularly vulnerable to harassment and embarrassment by the use of their prior sexual history. While victims are permitted to remain anonymous in criminal proceedings, such protection is generally not afforded in civil actions.<sup>79</sup> The widely publicized case against basketball star Kobe Bryant provides an extreme example of the consequences that can ensue when a complainant’s name is revealed.<sup>80</sup> Bryant’s accuser eventually backed out of the criminal prosecution when she was stalked, hounded by reporters, received death threats, and had details about her sexual and psychiatric history posted on the internet.<sup>81</sup> While the amount of publicity in the Bryant case is by no means the norm, it nonetheless remains in the public psyche and affects all victims’ decisions on whether to come forward.<sup>82</sup> Civil plaintiffs are also more vulnerable to sweeping discovery of their sexual history even in the presence of rape shields.<sup>83</sup> Thus, a defendant (especially a third-party corporate defendant) with sufficient resources could harass the plain-

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76 See *id.* at 42–45 (pointing out that the inherent subjectivity in a civil verdict opens the door to the influence of jurors’ personal views).

77 See *supra* note 18 and accompanying text.

78 See OVERLAND, *supra* note 75, at 26–27 (discussing findings that jurors believe most lawsuits are frivolous).

79 See Lininger, *supra* note 66, at 1578.

80 While the civil case settled out of court, the complainant’s name was leaked on several occasions during the prior criminal proceeding. See Maggard, *supra* note 9, at 1344 n.11 (discussing three instances in which the court itself leaked the information, including information about an in camera rape shield hearing); *Suit Settlement Ends Bryant Saga*, MSNBC.COM, (Mar. 3, 2005), <http://www.msnbc.msn.com/id/7019659>.

81 See Maggard, *supra* note 9, at 1343.

82 Humiliation and publicity of sexual history is an important reason that rapes go unreported. See LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE* 6–7 (1991).

83 See Jane H. Aiken, *Protecting Plaintiffs’ Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 560 (2002) (noting that Rule 412 is an admissibility rule, not a discovery rule, and thus “civil defendants have virtually unrestricted access to a plaintiff’s sexual past during the discovery stage of the litigation”).

tiff into an unfavorable settlement by using extensive embarrassing questions about her sexual past.

### B. *Rape Myths in Action in Civil Courts*

States not extending rape shield protection to civil plaintiffs have struggled to avoid the influence of rape myths and imposed substantially similar or slightly modified versions of the “ideal victim” requirement on civil plaintiffs. Because civil proceedings differ from criminal by assessing both liability for the harm and an additional determination of damages, the “ideal victim” requirement has been imposed differently in the two distinct areas.<sup>84</sup> In the area of liability, the absence of rape shield protection has allowed courts to endorse the inference that previous sexual experience makes consent more likely or that it undermines the plaintiff’s credibility. Both theories embrace traditional rape myths. In the area of damages, courts have allowed arguments that previous sexual experience makes assault less harmful and that emotional trauma caused by previous assaults should reduce a plaintiff’s award for emotional distress. Here, application of traditional tort principles demonstrates that evidence of the plaintiff’s past sexual history is often irrelevant and should be excluded due to its potential for prejudicial effect.

#### 1. The Influence of Rape Myths on the Determination of Liability

Where rape shield protections are not available, evidence of previous sexual history has been allowed first on issues relating to liability. The cases below illustrate the various ways in which defendants have been able to overcome the normally low bar for relevancy in order to allow evidence that invokes the “ideal victim” requirement and how without rape shield protections the courts have been complicit in maintaining it.

The plaintiff in *Barnes v. Barnes*<sup>85</sup> sued her father for multiple acts of rape over a four-day period when she was fifteen years old, resulting in a variety of injuries, most importantly posttraumatic stress disorder (PTSD).<sup>86</sup> After a jury verdict for the plaintiff awarding \$250,000 in compensatory damages and \$3,000,000 in punitive damages, the defendant appealed arguing, *inter alia*, that Indiana’s rape shield stat-

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84 Importantly, it should be noted that the two determinations are not usually bifurcated, and evidence introduced for one purpose may serve to influence other aspects of the proceedings.

85 603 N.E.2d 1337 (Ind. 1992).

86 *Id.* at 1339.

ute was incorrectly applied to exclude evidence of the plaintiff's past sexual history.<sup>87</sup>

The trial court granted the plaintiff's motion in limine excluding evidence of prior abuse, including numerous instances of sexual assault and abuse by her brother and paternal grandmother,<sup>88</sup> sexual assaults perpetrated by older boys in her neighborhood,<sup>89</sup> and four separate occasions of rape, including gang rape.<sup>90</sup> The trial court also excluded testimony from the plaintiff's boyfriend, who observed the plaintiff after the attacks and would have testified that he did not see any bite marks or bruises consistent with plaintiff's description of the attack.<sup>91</sup>

The Indiana Supreme Court reversed the trial court's ruling. First, the court pointed out that Indiana's rape shield<sup>92</sup> applied only in the context of criminal proceedings and refused to extend it to civil proceedings.<sup>93</sup> Troublingly, the court stated that

[u]nlike the victim in a criminal case, the plaintiff in a civil damage action is "on trial" in the sense that he or she is an actual party seeking affirmative relief from another party. Such plaintiff is a voluntary participant, with strong financial incentive to shape the evidence that determines the outcome.<sup>94</sup>

The court analogized the civil rape plaintiff seeking to exclude prior sexual history to a personal injury plaintiff seeking to assert the physician-patient privilege. By putting mental or physical condition at issue, the court reasoned, a plaintiff essentially waives the protection.<sup>95</sup>

The court then balanced the possible prejudice of allowing the evidence against its probative value and found that evidence of previous assaults was "obviously relevant" because the evidence "(1) fully rebutted the 'traumatic stress' theme that was the centerpiece of [the

87 *Id.*

88 *Id.* at 1343-44.

89 *Id.*

90 *Id.* at 1344.

91 *Id.* The Indiana Supreme Court found that this evidence should have been allowed as relevant to the issue of liability, and with regard to this specific evidence I agree. Testimony about the plaintiff's physical condition after the attack was relevant with respect to the plaintiff's specific allegations, and the defendant had a right to inform the jury completely with regard to how the witness observed her physical condition.

92 See IND. CODE § 35-37-4-4 (2004).

93 See *Barnes*, 603 N.E.2d at 1342.

94 *Id.*

95 See *id.* at 1342-43. For a discussion of the implications of the court's ruling with respect to damages, see *infra* Part III.B.2.

plaintiff]’s case on both liability and damages and (2) directly undermined her credibility in testifying to the depraved acts allegedly committed by the defendant.”<sup>96</sup> The court also found error in the trial court’s grant of a motion in limine prohibiting inquiry about the plaintiff’s sexual history in depositions, reasoning that “actual sexual conduct is highly relevant to the issue of damages” and that the defendant should be allowed to inquire about other possible sources of the plaintiff’s mental injury.<sup>97</sup>

With respect to liability, the Indiana Supreme Court’s approach to past sexual history evidence in civil rape trials is a paradigmatic illustration of the continued persistence of the “ideal victim” requirement. First, to suggest that plaintiffs in actions for sexual misconduct should not be protected because they are “voluntary participant[s]” who are “on trial” is to undervalue the restitution goals of tort law. Certainly the plaintiff—and society generally—would prefer the harm not occur. But where a tort victim has a legitimate claim for relief, their deviation from the “ideal victim” makes the defendant no less liable. While the plaintiff’s participation is technically “voluntary” in the strictest sense of the word, she should be entitled to no less protection from embarrassment and harassment by the opposing side. To hold otherwise is to be passively compliant with practices that discourage tort victims from seeking recovery. Further, in the special context of rape cases, it is also a statement to victims that we as a society consider them liars until proven otherwise.

Second, without explaining why, the court endorsed the defendant’s argument that previous assaults made the plaintiff’s testimony less credible.<sup>98</sup> The lack of explanation seems to suggest that the court simply did not believe the plaintiff’s description of her previous sexual assaults. So the court was willing to allow the defendant to impeach the plaintiff’s credibility by essentially arguing a theory of previous false accusations, without a showing that the plaintiff’s description of previous assaults was indeed false.<sup>99</sup> This idea is a slightly modified manifestation of the traditional notion that women previously assaulted are more likely to lie about an encounter after the fact,<sup>100</sup> or that a woman raped more than once must be “asking for it.”

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96 *Barnes*, 603 N.E.2d at 1344.

97 *Id.*

98 *See id.*

99 However, in its endorsement, the court did not clearly articulate which evidence supported which aspect of the defendant’s theory.

100 *See* Heather D. Flowe et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women’s Sexual History on Rape Allegations*, 31 *LAW & HUM. BEHAV.* 159, 161 (2007) (“To date, no study has examined the effects of complainant sexual

Other courts in states not extending rape shields to civil actions have similarly allowed previous sexual history to be considered with respect to liability. In *Kravitz v. Beech Hill Hospital*,<sup>101</sup> a fourteen-year-old girl and her mother sued an adolescent drug and alcohol treatment facility claiming she had been raped while residing there for inpatient treatment. The trial court issued a pretrial order excluding evidence of previous consensual sexual activity, but allowed questioning with regard to previous false accusations of sexual assault.<sup>102</sup> The defense introduced evidence that the plaintiff told her caretaker she had been raped by three men, but told her therapist that the incident was consensual.<sup>103</sup> The New Hampshire Supreme Court found no violation of the pretrial order because the defense's theory, according to the court, was that the inconsistent statements undermined the plaintiff's credibility and thus the evidence was probative on the issue of consent.<sup>104</sup>

The problem with the result in *Kravitz* is that evidence of a previous sexual encounter unrelated to the conduct at issue in the case allowed the defense to tap into the traditional myth that consent to one sexual encounter makes consent to another sexual encounter more likely. The evidence was admitted on the defense's theory that inconsistent statements about whether the previous unrelated encounter was consensual tended to undermine the plaintiff's credibility with regard to the encounter at issue. The court was satisfied that the trial court's limiting instruction, providing that the previous encounter not be considered when determining the issue of consent in the present matter, sufficiently minimized any prejudice.<sup>105</sup> But the mere fact that the court recognized the potential for prejudice is an acknowledgement that rape myths were in play. Given the effects of deeply rooted cultural notions about rape victims,<sup>106</sup> and traditional juror bias against civil plaintiffs generally,<sup>107</sup> a limiting instruction is not enough. Once the jury hears the evidence, even if limited to the impeachment purpose, the policy goals of rape shields are automatically undermined. Like Indiana's, New Hampshire's rape shield

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history on falsely alleging rape. Nevertheless, sexual history is sometimes used by third parties to determine whether rape occurred.”).

101 808 A.2d 34 (N.H. 2002).

102 *Id.* at 40.

103 *Id.* at 40–41.

104 *Id.* at 41.

105 *See id.*

106 *See supra* notes 12–19 and accompanying text.

107 *See supra* note 78 and accompanying text.

statute does not apply to civil proceedings.<sup>108</sup> If New Hampshire had protections similar to the federal framework, the burden would have been on the defendant to show that the probative value of the inconsistent statement—namely its effect on credibility—substantially outweighed the prejudice of introducing evidence that would inevitably invoke rape myths.<sup>109</sup> When conducted prior to admitting the evidence and combined with a limiting instruction if the evidence is admitted, a Federal Rule 412–like balancing inquiry would provide better protection for victims while still protecting the right to present a defense.

In *Ayuluk v. Red Oaks Assisted Living, Inc.*,<sup>110</sup> the plaintiff sued an assisted living community alleging that one of her caregivers had sex with her on numerous occasions, some of which were not consensual.<sup>111</sup> There was expert testimony that the plaintiff, due to a brain injury, had a diminished capacity to consent to sex when variables such as power relationships and differing levels of cognitive competence were at issue.<sup>112</sup> In rebuttal, the defendant introduced evidence of the plaintiff’s previous sexual history, “touch[ing] on birth control, pregnancy, and other sexual relationships,”<sup>113</sup> in order to prove her capacity to consent. The court recognized that “very little of this evidence directly pertained to [the plaintiff]’s capacity to consent,”<sup>114</sup> but allowed it as circumstantial evidence of such capacity.<sup>115</sup> The court failed to discuss in its opinion the nature of the questions regarding sexual history.

The plaintiff’s expert testified that the plaintiff had a diminished capacity to consent when differential power relationships—such as patient-caregiver—and different levels of cognitive capacity between the parties were involved, the exact situation at issue in the case. The opinion did not discuss whether the defendant should have rebutted the testimony by providing expert testimony that plaintiff did not have such diminished capacity. Instead, the court allowed the jury to rely on the fact that the plaintiff had consented to other sexual encounters—apparently not involving power relationships and differing cognitive capacity—in order to find that she had capacity to consent to sex with her caregiver. By allowing such an inference, the

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108 See N.H. R. EVID. 412.

109 See *supra* notes 32–34 and accompanying text.

110 201 P.3d 1183 (Alaska 2009).

111 *Id.* at 1188–89.

112 *Id.* at 1196.

113 *Id.*

114 *Id.*

115 *Id.*

court allows the defense to invoke what is essentially a variation on the myth that consent to previous encounters with third parties makes consent to the encounters at issue more likely. Further, it stretches the imagination to assert that birth control use in any way makes consent more likely—but such evidence would clearly tend to invoke any juror biases against women who use contraception.

When it comes to liability alone, these cases demonstrate that states without rape shield protection for civil plaintiffs continue to allow inferences drawn from traditional rape myths. A presumption of inadmissibility such as that provided in Federal Rule 412 would serve to help eliminate evidence of minimal probative value when it has obvious potential for prejudicial or confusing effect. Without further protection, the “ideal victim” requirement will survive, discouraging victims from seeking recovery and allowing perpetrators to escape responsibility.

## 2. The Influence of Rape Myths on the Calculation of Damages

By not extending rape shield protections to civil proceedings, states have allowed rape myths to infect the process with respect to liability. However, when sexual history evidence is allowed in state civil proceedings, it is often allowed for the purposes of calculating damages as well. For example, the *Barnes* court noted that

actual sexual conduct is highly relevant to the issue of damages. Since the plaintiff was seeking compensation for mental injury resulting from the defendant’s sexual conduct, it was clearly proper for the defendant to determine whether she had suffered other experiences which could have caused or contributed to her injury.<sup>116</sup>

Thus, the court found that because the plaintiff was seeking recovery in part for PTSD, evidence of her extensive history of sexual abuse<sup>117</sup> should have been admitted on the theory that the defendant should not be liable to the plaintiff for any psychological damage caused by a third party’s previous abuse.<sup>118</sup>

Like the *Barnes* court, courts in states not extending rape shields to civil actions have allowed the introduction of prior sexual history evidence for the purpose of reducing damages. In *Birkner v. Salt Lake County*,<sup>119</sup> the Supreme Court of Utah<sup>120</sup> upheld a trial court ruling allowing the defense to question the plaintiff about prior relations

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116 *Barnes v. Barnes*, 603 N.E.2d 1337, 1344 (Ind. 1992).

117 See *supra* notes 88–90 and accompanying text.

118 See *Barnes*, 603 N.E.2d at 1344.

119 771 P.2d 1053 (Utah 1989).

with her ex-husband. The plaintiff, who was later diagnosed with multiple personality disorder due to previous sexual abuse by her father,<sup>121</sup> sued her treating social worker after the two kissed and the social worker touched the plaintiff's breasts.<sup>122</sup> Defense counsel was allowed to ask the plaintiff about previous relations with her ex-husband in order to show that her condition was not worsened by her relations with the defendant.<sup>123</sup> The defendant was found negligent with regard to his treatment of the plaintiff, while the plaintiff's claim of sexual battery was not submitted to the jury.<sup>124</sup> The jury assigned ten percent of liability to the plaintiff, and she appealed the admissibility of the defendant's questions. The court did not discuss the issue extensively, but in upholding the trial court's ruling, it seemed to imply that if the plaintiff had previously engaged in the type of conduct at issue with a third party, it would tend to show that it was less offensive to her in the present case, thus reducing actual damages.

Even states adopting civil rape shields have allowed prior sexual history on the issue of damages. In *Ten Broeck Dupont, Inc. v. Brooks*,<sup>125</sup> the plaintiff sued a psychiatric facility claiming that an orderly "forced her to have sexual intercourse."<sup>126</sup> At issue was the admissibility of hospital records showing that the plaintiff told a nurse that her libido had increased, that she "liked sex too much," "had been sexually promiscuous[.]" and that "[s]he reported conflicted feelings in regard to her sexual promiscuity, stating that she was bi-sexual and that this condition 'stresse[d] her.'"<sup>127</sup> At trial, the defendant's expert witness was not allowed to testify about damages, the fact that the plaintiff's mother claimed that the plaintiff had been molested by her father, and that the plaintiff's "many sexual relationships caused her to express concerns of shame, guilt and lack of self esteem."<sup>128</sup>

Kentucky's rape shield adopts the same language as Federal Rule 412 with regard to civil plaintiffs.<sup>129</sup> Nonetheless, the court found that

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120 Utah does not extend its rape shield protections to civil plaintiffs. See UTAH R. EVID. 412 advisory committee's note ("[U]nlike the [later adopted] federal rule, the Committee has chosen, at the present time, to limit Rule 412's application to criminal cases because of the lack of judicial experience or precedent imposing these evidentiary restrictions in a civil context.").

121 *Birkner*, 771 P.2d at 1055.

122 *Id.* at 1055.

123 *Id.* at 1061.

124 *Id.* at 1056.

125 283 S.W.3d 705 (Ky. 2009).

126 *Id.* at 710.

127 *Id.* at 712.

128 *Id.*

129 See Ky. R. EVID. 412.

all of the evidence tended to prove the state of her mental health and preexisting damages.<sup>130</sup> Pursuant to the balancing test provided by the rule, the court found that any potential unfair prejudice or harm to the plaintiff was outweighed by the probative value of the evidence.<sup>131</sup>

Review of these cases seems to suggest that on the issue of damages, courts allow prior history evidence for two main purposes. First, to show that because of previous consensual experiences with third parties, any nonconsensual contact of a similar nature will be less offensive. Second, courts allow evidence of previous sexual trauma to show existing mental injury not caused by the defendant.

Using previous consensual contact with third parties to show that the nonconsensual contact at issue was less damaging—as was the apparent theory in *Birkner*—should be dismissed out of hand. To recognize such a premise is to explicitly adopt the view that virgins should recover more in civil rape proceedings than nonvirgins. This is the “ideal victim” requirement in its purest form.

When evidence of previous trauma is allowed on the issue of damages, as in *Barnes* and *Brooks*, it implicates different concerns. At first glance, evidence of mental injury caused by previous sexual abuse by third parties seems relevant to the amount of damage actually caused by the defendant. Admittedly, in a broader sense, it is only fair that defendants not be held liable for harm caused by the conduct of others. Thus, one could argue that under the framework of a civil rape shield like Federal Rule 412, the probative value of previous abuse evidence outweighs any embarrassment or prejudice to the plaintiff. However, a closer look at tort principles as applied to the nature of the harm suffered by rape victims reveals that evidence of previous sexual abuse or trauma is irrelevant. Thus, because courts continue to allow such evidence even in the presence of shields following the federal framework, civil rape shields should be extended to exclude evidence of previous sexual trauma at the discretion of the plaintiff.

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130 See *Brooks*, 283 S.W.3d at 719. The court found that because the plaintiff's expert was allowed to testify to a hypothetical damages theory based on the average victim without examining the plaintiff, evidence of her sexual predisposition was relevant to damages. See *id.* Further, similar to the finding of the Indiana Supreme Court in *Barnes*, the report of molestation by the plaintiff's father was relevant to existing emotional injury not caused by the defendant. See *Barnes v. Barnes*, 603 N.E.2d 1337, 1344 (Ind. 1992); *Brooks*, 283 S.W.3d at 719.

131 *Brooks*, 283 S.W.3d at 720.

One of the most common psychological injuries suffered by rape victims is posttraumatic stress disorder (PTSD).<sup>132</sup> PTSD stemming from sexual assault is conceived as an acute reaction to an event, because most survivors' symptoms tend to decrease or return to normal within a matter of months.<sup>133</sup> It can consist of a wide variety of symptoms. By definition, PTSD involves feelings of intense fear or horror, recurrent recollections or dreams of the event, and increased arousal symptoms such as difficulty concentrating.<sup>134</sup> However, PTSD does not describe or encompass common reactions to rape such as "depression, anger, sexual dysfunction, guilt, humiliation, and disruption in core belief systems about the self and others that are also common symptoms among rape survivors."<sup>135</sup>

With regard to apportionment of damages, it is important to realize that PTSD requires no abnormality prior to the triggering stimulus. That is, it can happen to anyone who experiences psychic trauma, whether or not they have experienced previous trauma.<sup>136</sup> This significant aspect of PTSD, along with the indeterminate nature of other

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132 Laura E. Boeschen et al., *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL'Y & L. 414, 426 (1998) ("90% of rape survivors experience PTSD symptoms immediately after the rape, and 15% of rape survivors are diagnosed with lifetime PTSD . . . ." (citing F.H. Norris, *Epidemiology of Trauma: Frequency and Impact of Different Potentially Traumatic Events of Different Demographic Groups*, 60 J. CONSULTING & CLINICAL PSYCHOL. 409 (1992); B.O. Rothbaum et al., *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 455 (1992))).

133 See, e.g., David P. Valentiner et al., *Coping Strategies and Posttraumatic Stress Disorder in Female Victims of Sexual and Nonsexual Assault*, 105 J. ABNORMAL PSYCHOL. 455, 455, 457 (1996) (noting that "acute PTSD reaction has been distinguished from chronic PTSD" and that "most victims recover to varying degrees within 3 months following the assault"). The common symptoms experienced by sexual assault victims are often described under the moniker of "Rape Trauma Syndrome" (RTS). See Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591, 601 (2000) ("[RTS] is a description of the emotional and psychological reactions that a woman who is raped may have before, during, and after the rape."). Importantly, while RTS is a type of PTSD, it is not the same as PTSD. See *id.* at 602.

134 See Boeschen, *supra* note 132, at 417.

135 *Id.* at 418 (citing I.L. McCANN & L.A. PEARLMAN, *PSYCHOLOGICAL TRAUMA AND THE ADULT SURVIVOR* (1990); B.M. Atkeson et al., *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. CONSULTING & CLINICAL PSYCHOL. 96 (1982); J.V. Becker et al., *Incidence and Types of Sexual Dysfunctions in Rape and Incest Victims*, 8 J. SEX & MARITAL THERAPY 65 (1982); R. Janoff-Bulman & I.H. Frieze, *A Theoretical Perspective for Understanding Reactions to Victimization*, 39 J. SOC. ISSUES 1 (1983); D. Kilpatrick et al., *Mental Health Correlates of Criminal Victimization: A Random Community Survey*, 53 J. CONSULTING & CLINICAL PSYCHOL. 866 (1985)).

136 See Elizabeth L. Turk, *Abuses and Syndromes: Excuses or Justifications?*, 18 WHITTIER L. REV. 901, 934 n.293 (1997) (noting that PTSD is "one of the few kinds of

emotional distress experienced by rape victims, necessitates that courts take a different approach to the assessment of damages.

Traditional tort principles require that where there are distinct harms, or harms which can reasonably be apportioned to separate tortfeasors, each tortfeasor should pay only the damages caused in fact by their conduct; but when the damages cannot be apportioned by a reasonable determination, any tortfeasor whose conduct is a substantial factor in causing the injury is assigned the full damages.<sup>137</sup> The rule comes from the traditional tort law focus on physical injury, as opposed to mental distress.<sup>138</sup> As compared to mental injury, physical injury provides for relatively neat apportionment of damages among multiple tortfeasors.<sup>139</sup> For example, if a person is ten percent disabled by an ankle injury before they are involved in a car accident which totally disabled them, the negligent party who caused the car accident would only be responsible for ninety percent of the disability.

The psychological trauma suffered by rape victims is not so easily apportioned, mostly because emotional disturbance is not easily quantified. In *Brooks*, the court overruled the exclusion of evidence that the plaintiff had been previously abused and that her promiscuity and bisexuality “stresse[d] her,” which the defendant sought to introduce on the issue of damages.<sup>140</sup> The court found the evidence relevant, but avoided the issue of how the jury was to determine where the previous sexual abuse injuries ended and the injuries caused by the defendant began. The court in *Barnes* similarly ignored the issue of whether damages could be reasonably apportioned between past and present sexual abuse.<sup>141</sup>

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psychiatric disorders that is considered a normal response to an abnormal situation” (quoting PAUL MONES, *WHEN A CHILD KILLS* 70–71 (1991)).

137 See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 (2010) (“Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.”); RESTATEMENT (SECOND) OF TORTS § 433A (1965) (“(1) Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm. (2) Damages for any other harm cannot be apportioned among two or more causes.”).

138 Until fairly recently, any recovery for emotional disturbance required a showing of some physical manifestation. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (noting that “only within recent years” has intentional infliction of emotional distress been recognized absent the elements of other traditional torts such as assault).

139 Obviously this is not always true, as in the case of soft tissue damage exacerbated by some other incident such as a car wreck.

140 *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 719–20 (Ky. 2009).

141 See *Barnes v. Barnes*, 603 N.E.2d 1337 (Ind. 1992).

Because of the unique and varied emotional and physical responses of rape victims,<sup>142</sup> there is little chance of discovering a reasonable line between the two causes of harm—especially given that PTSD can be experienced with or without previous sexual trauma. From a philosophical standpoint, the nature of emotions like depression and humiliation are necessarily fluid and difficult to assign to one event or another. In such situations, courts should refuse to “make an arbitrary apportionment for its own sake.”<sup>143</sup>

This argument deals a fatal blow to the admissibility of previous sexual trauma evidence. First, it is unlikely that a defendant will dispute that his conduct is a substantial factor in causing a rape victim’s mental injury. Thus, since damages cannot reasonably be apportioned, the relevance of any previous sexual trauma does not outweigh its prejudicial effect, and it should be excluded under a rape shield tracking the federal framework. The fact that previous sexual trauma may have also been a substantial factor in causing the plaintiff’s injury is irrelevant when the defendant is liable for the full injury anyway. Second, from a pure policy standpoint, allowing a jury to arbitrarily decide when the damages from previous sexual trauma end and present damages begin permits yet another avenue through which the “ideal victim” requirement can infect the process. It allows the defendant a windfall when his victim has prior history of abuse. Despite the fact that a victim with no previous history could have the same PTSD reaction, or the same degree of fear and depression, a victim previously abused has her recovery reduced and the defendant reaps the benefit. Thus the previously abused victim—compared to a victim with no previous abuse—is “sullied property,” less deserving of the protection of the law.<sup>144</sup> If the policy underlying rape shields is to encourage reporting and prevent embarrassment and harassment, admitting sexual trauma evidence will discourage a particularly sus-

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142 See *supra* notes 36–49, 132–136 and accompanying text.

143 RESTATEMENT (SECOND) OF TORTS § 433A cmt. i. Comment i notes that where there is no reasonable way to divide damages among causes, and each cause is a substantial factor in the injury, each of the causes should be responsible for the injury. *Id.*

144 See *supra* notes 16–18 and accompanying text. Importantly, this Note is not intended to argue that all emotional injury is necessarily incapable of severability. Rather, I mean only to argue that evidence of previous sexual trauma in the specific context of rape victims is irrelevant in that the emotional injury suffered from one event cannot be reasonably separated from previous events without the prejudicial effect of rape myths.

ceptible class of victims<sup>145</sup> from coming forward and being compensated.

Framed differently, injury from previous sexual trauma could be viewed not as preexisting injury, but a preexisting condition that leads to unforeseeable damages. When the damages suffered by rape victims are analyzed this way, other traditional principles of tort law weigh in favor of excluding evidence of previous sexual trauma.

At common law, the “thin skull” or “eggshell skull” rule, which applies in all jurisdictions, maintains that even when the extent of harm to a tort victim was unforeseeable due to a preexisting condition, the tortfeasor is nonetheless liable for the full extent of the harm.<sup>146</sup> The rule requires that when a defendant engages in unlawful conduct, either intentionally or by accident, they take their victim as they find them. As between a defendant who is essentially just unlucky to have harmed a particularly susceptible person and a victim who would be undercompensated without the rule, the principles of tort law favor full compensation over the usual limits of proximate cause.

In the context of civil actions for sexual assault, when a defendant seeks to introduce evidence of previous sexual trauma, one could characterize their argument as establishing a preexisting mental condition. In such a case, the circumstances that caused their preexisting condition (prior sexual trauma) will be irrelevant. Certainly, if a battery plaintiff suffers unforeseeably because they are a hemophiliac, the circumstances that led to their condition are usually of no concern. What matters is that the plaintiff in fact suffered the damages, and the law of proximate cause holds the defendant liable even though the full extent of the damages was not reasonably foreseeable. The same is the case for rape victims who suffer unique mental injury because of a preexisting susceptibility due to previous trauma. The fact that their condition was caused by previous trauma is irrelevant and will only serve as a conduit for rape myths to infect the jury’s

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145 See Tess Wilkinson-Ryan, Comment, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1394 n.112 (2005) (citing studies indicating a high rate of revictimization among victims of sexual assault or abuse).

146 See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 31 (Tentative Draft No. 3 2003) (“When an actor’s tortious conduct causes harm to a person that, because of the person’s preexisting physical or mental condition . . . is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person.”). Section 461 of the *Restatement (Second) of Torts* is similar, but extends only to preexisting physical conditions. RESTATEMENT (SECOND) OF TORTS § 461.

determination. What matters is that the plaintiff suffered a mental injury, and the defendant should be liable for the full extent of their injury regardless of whether it was reasonably foreseeable that the plaintiff had experienced previous sexual trauma.<sup>147</sup>

#### CONCLUSION

When courts allow irrelevant evidence of sexual history and predisposition, it not only prevents victims from coming forward or prosecuting fully because of the threat of embarrassment, but allows defendants to escape responsibility by relying on false impressions about the nature of rape and rape victims. Such failure is a continuing statement to rape victims that any deviation from culturally acceptable behavior makes them undeserving of the full protection of the law. By passing rape shield statutes, Congress and the states adopted an important means of holding more offenders responsible by encouraging reporting by preventing embarrassment and harassment, as well as reliance on rape myths.

While advancing the end of holding offenders criminally responsible is of great importance, the role of the justice system should not end there. Equally important is ensuring that victims be compensated fully for their injuries, both mental and physical. Because the criminal justice system is ill equipped to do more than punish offenders, we should encourage victims to seek redress in civil courts, where significant substantive and procedural advantages allow creative settlement agreements or monetary judgments that can help make victims whole.

States that do not extend rape shield protection to civil proceedings have allowed defendants to continue their reliance on rape myths to escape liability, or to introduce irrelevant evidence that confuses courts and juries and prevents victims from gaining full recovery for their damages. Only by extending rape shield protections to civil actions do we give victims the full protection of the law, and completely reject the archaic "ideal victim" requirement.

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147 One could argue that for the purposes of the "thin skull" rule, a victim of previous sexual trauma is different than, for example, a hemophiliac because previous sexual trauma is caused by an identifiable party against whom the plaintiff could have recovered. Nothing in my argument suggests that the defendant should not be allowed to implead other potential tortfeasors, which would regrettably bring up events that would otherwise not be at issue, but would not reduce the plaintiff's overall recovery. It is when these other tortfeasors cannot be located or are perhaps judgment-proof that the policy of the "thin skull" rule suggests that the defendant and not the plaintiff should bear the loss.