TRIANGULATING RAPE

SARAH SWAN†

ABSTRACT

Civil actions for rape and sexual assault have recently been undergoing significant changes in both quantity and quality. Quantitatively, the number of these kinds of cases has increased dramatically since the 1970s. Qualitatively, the litigation has shifted from a woman versus man paradigm to a triangulated tort claim involving a female plaintiff, a male defendant, and a corporate or institutional third party entity that either facilitated or somehow failed to prevent the sexual harm. While it may seem odd to think of sexual assault as involving three parties, the legal forms of rape have traditionally been triangulated. Historically, rape was a legal wrong between two men regarding one's proprietary interest in a woman: one man's rape of another man's wife, daughter, or servant would be legally constructed as a wrong done to him. Then, as this triangulation faded and the criminal justice system became the main forum for rape redress, the criminal triangulation of state versus male defendant, regarding the wrong to a woman, became the dominant structure of rape law.

Despite the fact that the criminal regime has been demonstrably unsuccessful in addressing or deterring sexual harms, it remains the primary forum for their adjudication, and many cultural, legal, and political pressures encourage women to rely solely on this system. This article argues against those pressures, and asserts that triangulated claims in private law represent a potentially promising avenue of redress for sexual harms. These civil suits can function as "crimtorts" (private civil actions which target public harms). Although they must overcome some significant obstacles, triangulated civil suits can serve as an important tool in targeting the social realities that contribute to sexual assault.

† J.S.D. Candidate, Columbia University. Thanks to Elizabeth Emens, Robert Ferguson, Katherine Franke, Philip Hamburger, Carol Sanger, the participants of the 2011 Yale Law Doctoral Scholarship Conference, and the participants of the Columbia Law Associates and Fellows Workshop for their comments and contributions.

I.
INTRODUCTION

Lately, civil litigation for sexual assault and rape has been undergoing "a drastic metamorphosis."[1] In the early to mid-twentieth century, only a small

1. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing*

number of civil claims were based on sexual harms; now, the number of these cases has risen "dramatically, perhaps exponentially."[2] In addition to this large increase in the number of claims, there has been "an evolution in the very nature" of the litigation itself.[3] Rather than a plaintiff-defendant binary, a new three-party structure has emerged in the civil litigation of sexual harms.[4] Plaintiffs are bringing tort suits not only against the perpetrators of sexual wrongs, but also against third-party institutions or corporations that facilitated or failed to prevent the sexual assault.[5]

The typical case involving this new three-party structure consists of a female plaintiff, a male defendant, and a third-party entity like a landlord, corporation, business, school, hospital, or other similar organization.[6] For example, female plaintiffs have brought actions against cruise ships and their employees for sexual assaults that occurred while they were passengers; against colleges and students after being sexually assaulted at fraternity parties or in dorm rooms; and against hospitals and medical personnel for sexual harms perpetrated during the course of treatment.[7] Plaintiffs typically assert general tort

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Liability on Landlords for Crime on the Premises, 42 CASE W. RES. L. REV. 679, 684 (1992), *quoted in* Janet Colaneri & Bobbi Reilly, *Non-Actor Liability for Sexual Assaults in Texas and the Effect of Insurance on Recovery*, 2 TEX. WESLEYAN L. REV. 279, 280 (1995). This article uses the term "civil litigation" to refer specifically to tort claims, though there are other avenues of seeking civil remedy for sexual harms. These include remedies in the "housing, education, employment, immigration, public benefits and family law arenas." Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, VAWNET, 1 (Sept. 2009), http://new.vawnet.org/Assoc_Files_VAWnet/AR_CivilTortActions.pdf.

2. Ellen Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 S.M.U. L. REV. 55, 58 (2006) [hereinafter Bublick, *Tort Suits*].

3. *Id.* at 61.

4. *Id.*

5. Before the 1980s, it was rare for any person, institution, or corporation to be sued based on acts of third-party perpetrators. Colaneri & Reilly, *supra* note 1, at 282.

6. *See* Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1373 (2010). In this article, I chose to focus on the scenario of a female plaintiff and male defendant because it is the most common type of sexual assault incident. Sexual harms "are overwhelmingly wrongs perpetuated by adult men against women, and against children of both sexes, but mostly girls." Bruce Feldthusen, *Discriminatory Damage Quantification in Civil Action for Sexual Battery*, 44 U. TORONTO L.J. 133, 134 (1994). For scholarship on male-male rape, see Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011).

7. In *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1208 n.4 (11th Cir. 2011), the judge noted that congressional reports indicate that "sexual assaults and other violent crimes on cruise ships are a serious problem," relying on the House Subcommittee on Coast Guard and Maritime Transportation Staff's assessment that "178 passengers on North American cruise lines reported being sexually assaulted between 2003 and 2004." *Id.* (citing *Crimes Against Americans on Cruise Ships: Hearing Before the Subcomm. on Coast Guard and Mar. Transp. of the H. Comm. on Transp. and Infrastructure*, 110th Cong. 2 (2007)) [hereinafter *Crimes on Cruise Ships*]. Additionally, the court cited statistics stating that between 2000 and 2005, the FBI "opened 305 case files 'involving crime on the high seas,'" and approximately "45% of those cases were sexual assaults that occurred on cruise ships." *Crimes on Cruise Ships*, *supra*, at 12 (statement of Rep. Souder, Chairman, Subcomm. on Crim. Justice, Drug Policy, and Human Res., Member, H.

theories of assault, battery, intentional infliction of emotional distress, and false imprisonment against the individual defendants, as well as negligence against the institutional third-party defendants.[8]

This article explores the significance of the triangulated legal form created by a female plaintiff, male defendant, and third-party entity, and argues that such actions are a potentially promising avenue of redress for sexual harms. In particular, these actions may ultimately be able to target the social realities underlying sexual assault, and thus have a transformative effect on the prevalence of sexual assault generally, a goal which other forms of rape adjudication have not yet achieved. In exploring the significance of this new phenomenon, this article considers how rape has previously been triangulated into a legal form involving three parties. Understanding the new civil triangulation in this historical context allows the triangle to work as a "graphic schema," representing how parties and their respective rights, interests, and obligations change depending on the particular configuration of the tripartite structure.[9] This framework has the added benefit of allowing us to map the shifting political consequences that follow each change in the triangulation.

While it might seem strange to think of sexual assault in terms of a three-party structure, sexual assault and rape actually have a long tradition of legal triangulation. Part I of this article charts the early history of rape law, in which rape was legally structured as a wrong between two men. An authoritative male, rather than a harmed woman, would bring a legal action against the other man for violating his property interest. In this legal form, sexual access to women was configured as a commodity belonging to a patriarch. Beginning in the twelfth century, rape started to be seen as a personal wrong to the woman harmed, but it was not until the nineteenth century that women could seek civil remedy for sexual harms at all. Even then this access was limited to the rubric of seduction law.

This historical survey introduces many of the tensions that continue to permeate rape law. Issues surrounding the law's relationship to revenge, the appropriate role of public and private law, and the connections between compensation and commodification have long affected rape law, and still affect even its newest triangulated form.

Part II explores the triangulation of rape in the modern criminal justice system. As the form of patriarchy associated with the old proprietary view of sexual violation became obsolete, criminal legal triangulation became the dominant structure of rape law. Rather than a dispute between two men over a

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Comm. on Gov't Reform). The "majority of cruise ship sexual assault cases are not prosecuted." *Crimes on Cruise Ships*, *supra*, (statement of Salvador Hernandez, Deputy Assistant Director, FBI).

8. See *infra* Part IV for a more detailed discussion of the doctrinal issues in this kind of negligence suit.

9. The framework of the triangle and its description as a "graphic schema" are borrowed from EVE SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 21 (1985).

harmed woman, the criminal justice system frames the wrong as a dispute between the state and a male defendant, regarding a harm to a woman. Also, whereas the historical triangulation protected the interest of an authoritative male in a society based on patriarchal order, the criminal triangulation promotes the interest of the state based on an assertion of the public interest.

Although the criminal triangulation has long been the main forum for rape redress, it has unfortunately failed as either a deterrent or remedial mechanism. The criminal law as it stands vindicates neither the public interest nor the private interests of the women who experience sexual harm. In part because the criminal triangulation constructs a binary narrative of sexual assault as an isolated event between a particular male defendant and a particular female plaintiff, and thereby obscures the broader social context that gives rise to sexual harms, criminal law has not been an effective remedy for rape.

Part III argues that civil triangulated actions are a potentially promising alternative to the criminal law's failure. Triangulated claims can act as "crimtorts," tort actions that accomplish the private law goals of compensation and remedy for the plaintiff, as well as the public law goals of deterrence and social change.[10] Triangulated claims also allow the plaintiff to undergo a process of subjectivization, a process that resists the objectification inherent in sexual assault and in the previous triangulations of rape law. The harmed woman takes on the role previously held by the patriarch and the state and asserts control over the legal process.

Further, through imposing liability on a third party, these triangulated claims show the social context in which sexual assault occurs. Institutions and third parties play a role in structuring masculinity and gender roles, and the environments they create often influence the prevalence of sexual harms. For instance, third-party decisions regarding safeguards, security protocols, and procedural responses when sexual harms do occur affect whether sexual harms continue to happen. Also, the relationship between the harmed woman and the third party has meaning and significance, and the action a third party takes to prevent sexual harms or to address them once they have happened sends a specific message about how the third party values those who are harmed. As tort liability incentivizes these third parties to take reasonable precautions and adopt policies and procedures that discourage sexual harms, sexual harms may become less normalized and less frequent.

Part IV sets out the obstacles that could stifle the robust development of civil triangulated actions in the area of sexual assault. Many of these obstacles connect to themes and tensions present in the historical and criminal triangulations. First, cultural pressures encourage women to leave vindication for sexual wrongs solely in the hands of the criminal law. However, even when women do so, they still have to overcome the myth that women lie about rape in

10. This term was coined by Thomas Koenig and Michael Rustad in their article *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J. L. REFORM 289 (1998).

order to seek revenge against men who have insulted them. Secondly, if both criminal and civil remedies are pursued, a complainant who has also filed a civil suit will face aggressive impeachment in the criminal trial, alleging that she has been improperly motivated by money. Thirdly, in civil cases, third parties may raise comparative fault claims in sexual assault suits and argue that the plaintiff was in some way responsible for her own assault. Fourthly, some courts are dismissing triangulated civil suits at the summary judgment stage, thereby preventing these actions from going to the jury, and impeding the development of this area of law. Finally, basic issues concerning access to justice present barriers to plaintiffs seeking redress in the civil courts.

Although these obstacles are significant, triangulated claims can still offer an appropriate means of redress for sexual harms. The development of triangulated civil claims maps the rise of feminism: as the feminist movement in the 1970s and 80s exposed gender inequalities and brought issues like violence against women into the public consciousness, civil claims began to increase.[11] As the push towards full gender equality continues, this form of redress will likely further expand and develop, with the effect that third parties will be brought into the project of gender equality through the means of tort liability and deterrence.

Moreover, moving away from the criminal justice system as the dominant means of redress may be one way in which feminism can begin to separate itself from the war on crime.[12] As Aya Gruber persuasively argued in a recent article, there are many ways in which the goals of feminism and the goals of the criminal justice system are not compatible. "[T]he philosophical tension between criminal punishment and feminism, the problematic politics of the current American criminal justice system, the limited potential of rape laws to shape gender norms, and the effects of criminal law on women victims" all suggest that feminism should consider "disentangling" itself from the criminal law.[13] Triangulated civil claims as a form of redress for sexual harms may be one step towards this kind of disengagement.

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11. *See* Tom Lininger, *Is it Wrong to Sue For Rape?*, 57 DUKE L.J. 1557, 1571 (2008) (noting that the number of published cases addressing third-party rape suits from 2003 to 2008 exceeds by 2,000 percent the number of published cases addressing such third-party suits in the early 1980s).

12. *See* Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581, 653 (2009) (arguing that women should "begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice"). For a commentary on how the American criminal justice system as a whole is dysfunctional, see WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

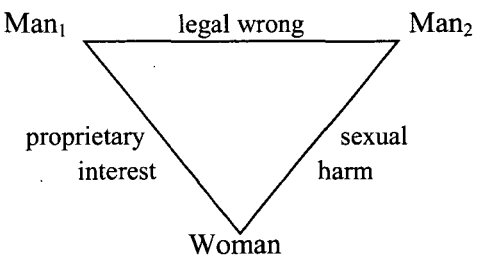
13. Gruber, *supra* note 12, at 585. *See also* Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. LEGAL STUD. 825, 826 (2011) (arguing that "feminist strategy and activism must rethink its approach to what constitutes justice for rape victims, going beyond punitive state outcomes to encompass broader notions of justice, including an expansive approach to restorative justice").

II.
A BRIEF HISTORY OF RAPE LAW

A. Man v. Man, Regarding Woman

Perhaps surprisingly, rape, as a legal action, historically involved three parties: the victim, the perpetrator, and the victim's husband, father, or master.[14] Rape was legally constructed as a wrong that one man did to another, by having an unauthorized sexual encounter with a woman in whom the other man had a proprietary interest.[15] The law framed the wrong of rape as a violation of an authoritative male's property right, not as a personal harm to the woman herself.[16] In fact, in some historical periods, the property violation of literally stealing a woman through forcible abduction and stealing her through rape were indistinguishable. Under Roman law, for example, "raptus" referred to both "forcible abduction" and "forcible sexual relations."[17] This conflation of meanings was repeated in the English tort of ravishment, defined as "abducting and/or raping a woman."[18] Indeed, even the more modern term "rape" connotes a proprietary interest. "Rape" comes from the Latin "rapere," which means "to carry off or seize."[19]

The diagram below illustrates the dynamics of this legal triangulation:



14. Indeed, triangulating harms through a male authority figure has long been a feature of patriarchal legal systems. For instance, under ancient Roman law, the paterfamilias (male head of the household) brought all legal actions for violence or insults done to those under his control. *See* Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923).

15. Francis Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 10 (2011) (discussing how from the earliest written laws, rape was considered a property crime).

16. Jane Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 375, 382 n.25 (1993).

17. JAMES BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 48 (1987).

18. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN. 271, 313 (2002). *See also* Emma Hawkes, *Preliminary Notes on Consent in the 1382 Rape and Ravishment Laws of Richard II*, 11 LEGAL HIST. 117, 117 (2007) (noting that the distinction between rape and ravishment was blurred in medieval common law).

19. KATHRYN GRAVDAL, RAVISHING MAIDENS: WRITING RAPE IN MEDIEVAL FRENCH LITERATURE AND LAW 4 (1991) (writing that the common meanings of *rapere* were "to carry off or seize; to snatch, pluck, or drag off; to hurry, impel, hasten; to rob, plunder; and finally to abduct (a virgin). . . .").

This framework establishes men as its legal subjects, and the harmed woman as its object of dispute. The authoritative male was considered the legally injured party, and it was his consent to the sexual encounter that was important in determining whether a legal wrong had occurred.[20] In this framing, the presence or absence of the woman's consent to sexual relations was legally irrelevant.[21] For instance, because a father had the legal right to control sexual access to his daughter, a sexual interaction forced on her, but approved by the father, was not rape.[22] On the other hand, a sexual interaction she consented to, or even desired, was rape if the father had not approved.[23] Similarly, a wife's consent to extra-marital sexual relations was irrelevant in determining whether rape had occurred.[24] Because the legal wrong was rooted in the male proprietary interest, whether the woman was willing or forced was not an important part of the claim.

Female consent was irrelevant in another way, too. Given that the authoritative male held the right of remedy, choosing to initiate legal proceedings was at his sole discretion. The harmed woman had little say over whether a legal suit was brought or not.

Men seeking legal remedy for *raptus* could choose to seek financial compensation or criminal punishment for the wrong done to them.[25] This choice of remedy continued into the early common law; crime and tort, and their respective remedies, were not distinct in the way that they are today.[26] The avenues of available redress incorporated both punishment of the wrongdoer and compensation.[27] Furthermore, there was no distinction between who could bring

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20. Larson, *supra* note 16, at 382 n.25.

21. *Id.*

22. *Id.*

23. For this reason, it is possible that some of the cases that fell into the raptus and ravishment frameworks were more akin to elopement than to what we now understand as rape. In fact, the Athenians considered the elopement type of seduction even worse than rape, since it involved not only an interference with the father's proprietary interest in his daughter's sexuality, it also took her feelings from him. *Id. See also* BRUNDAGE, *supra* note 17, at 48, 148 (discussing elopement in Roman and medieval common law).

24. *See* Larson, *supra* note 16, at 382 n.25 (noting that the historical focus of the crime of rape was on the damage done to the household or to the father's authority rather than on the personal injury suffered by the victim).

25. BRUNDAGE, *supra* note 17, at 48 (stating that "the father, employer, or owner of the victim of rape had a choice between seeking compensation for damages or criminal penalties for the offense" of forcible ravishment).

26. David Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996) ("In most instances, the same wrong could be prosecuted either as a crime or a tort.").

27. For example, Oliver Wendell Holmes described how under Anglo-Saxon law, "the winner of an action for damages could seize and destroy the animal or inanimate object which was the immediate cause of the injury suffered in order to 'punish' the losing party, and in Roman law contract breach was sometimes remedied through personally delivering the breacher to the aggrieved creditor." Antony Sebok, *Introduction: What Does It Mean to Say that a Remedy*

each type of claim, as either a victim or the king's officers, representing the government, could seek compensation or initiate proceedings to punish wrongdoers.[28] Following the Anglo-Saxon period, two distinct avenues emerged: writs of trespass would lead to compensation, whereas writs of felony, considered "instruments of vengeance," would lead to punishment.[29] There was no state agent who performed prosecutions; rather, wronged individuals were to serve as private prosecutors on their own behalves.[30]

When the compensation route was chosen, these legal historical triangulations commercialized the sexual dispute and commodified the sexual harm.[31] As long as the sexual injury was triangulated between two men, there was little objection to placing a monetary value on a woman's sexuality in this way. When her sexuality was understood as the property of the authoritative male, the translation of sexual violation into economic damages was not problematic for either courts or society.

As the availability of both compensation and punishment suggests, rape often blurred the line between a public and private offense, and different periods and regimes emphasized each of these aspects. For instance, under ancient Greek and Roman law, the focus was on rape as a private wrong, whereas in the time of Constantine in the fourth and fifth centuries, the focus was on rape as a public wrong.[32] The eleventh century took rape especially seriously, but understood it as "a crime primarily against the victim's father or male guardian."[33] The conception of rape as being fundamentally a public wrong, or fundamentally a private wrong, can therefore be viewed more as a political position than as an innate quality.

B. Political Context: Patriarchy

The historical triangulated legal form has obvious connections to a patriarchal society. The triangulation of rape as a wrong physically done to a

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Punishes?, 78 CHI.-KENT L. REV. 3, 3–4 (2003).

28. *See* Seipp, *supra* note 26, at 59–60 ("Victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort.").

29. Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 430–31 (2008).

30. *Id.* at 431.

31. *See* LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 47–48 (1998) (writing that the woman's eradication from the discourse surrounding litigation turns a suit concerning extramarital relations into a "legal story . . . about an economic relationship between two men, husband and lover, and it is about financially assessable damage to property").

32. *See id.* at 14, 107 (describing Greek law, which treated male authority figures as the aggrieved parties in rape actions and punished rape either through fines or more severe measures, and the law under Constantine, in which the principal innovation involved defining rape as a public offense rather than as a private wrong).

33. *Id.* at 209–10.

woman but legally occurring between men reflects the standard structure of homosocial relations: a male-male-female triangle.[34] As Claude Lévi-Strauss initially described, and Gayle Rubin later theorized upon, early social organization was dominated by these male-male-female triangulations, and the "exchange of women" between men that constituted them.[35] In early societies, men often exchanged women as a form of gift. For instance, a father would give his daughter in marriage to another man in order to cement a social bond between the two families.[36] However, the exchange of women could take many forms, some amicable and some hostile: women were "imported as brides, captured as war-booty . . . won in competitions, stolen through rape, hoarded as treasures, bequeathed as inheritances," and "even offered as sacrifices to the gods."[37]

These exchanges were a constitutive part of the social world; they generated bonds between men and helped them construct their social identities.[38] They also created and reflected a deep gender inequality: men had "certain rights in their female kin," while women lacked these "same rights either to themselves or their male kin."[39] The exchanges were part of a patriarchal society, establishing "relations between men, which have a material base, and which, though hierarchical, establish and create interdependence and solidarity among men that enable them to dominate women."[40] Indeed, the founding myths of Western civilization suggest that these triangulations are the very basis of patriarchy.[41]

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34. "Homosocial" is a term Eve Sedgwick used in her study of triangulation. It refers to social bonds between individuals of the same sex and encompasses the full spectrum of non-sexual and sexual desire. SEDGWICK, *supra* note 9, at 1.

35. Claude Lévi-Strauss described primitive kinship societies as formed in part by gift-giving, including exchanging women as a form of gift. *See* CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 61 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., Beacon Press 1969) (1949). Gayle Rubin focused on the implications of this exchange for women. *See* Gayle Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex, in* FEMINIST ANTHROPOLOGY: A READER 92–94 (Ellen Lewin ed., 2006).

36. *See* LÉVI-STRAUSS, *supra* note 35, at 63.

37. VICTORIA WOHL, INTIMATE COMMERCE: EXCHANGE, GENDER, AND SUBJECTIVITY IN GREEK TRAGEDY xiv (1998) (discussing how Greek tragedy dramatized the exchange of women).

38. *Id.* at xiii.

39. Rubin, *supra* note 35, at 94.

40. Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism*, 3 CAPITAL & CLASS 1, 11 (1979), *quoted in* SEDGWICK, *supra* note 9, at 3. Although patriarchy is sometimes used as shorthand for a system in which men dominate women, here I use it in the anthropological sense, to describe a particular societal structure. Later, I will adopt Connell's use of the term:

> "[P]atriarchy" is a serviceable term for historically produced situations in gender relations where men's domination is institutionalized. That is to say, men's overall social supremacy is embedded in face-to-face settings such as the family and the workplace, generated by the functioning of the economy, reproduced over time by the normal operation of schools, media, and churches.

R.W. Connell, *The State, Gender, and Sexual Politics: Theory and Appraisal*, 19 THEORY & SOC'Y 507, 514 (1990) [hereinafter Connell, *The State, Gender, and Sexual Politics*].

41. Carol Gilligan describes how the relationship between these triangulations and patriarchy is evident in many of the foundational stories and myths of Western culture. For instance, in the

In addition to creating mutually beneficial bonds between men, these male-male-female triangulations are also often a site of male rivalry.[42] For example, within the patriarchal system, a forced exchange through rape was a hostile challenge to the patriarch with a proprietary interest in the harmed woman. As illustrated in a Biblical story, the rape of Dinah, this kind of challenge often elicited violent revenge. In this story, Shechem, a man from a neighboring city, raped Dinah, and then wanted to marry her.[43] He had his father request the marriage and offer daughters of his own in exchange, along with any bride-price quoted. Dinah's brothers told Shechem and his father that they would allow the marriage if Shechem and his father agreed to be circumcised. They agreed and were circumcised, but while they were recuperating Dinah's brothers snuck into the city and killed all the men to avenge their sister's rape.[44]

The legal forms that regulated rape and abduction were sometimes justified on the basis that they prevented this kind of patriarchal violence and retribution.[45] Self-help retaliation evolved into "the more regularized public order of a lawsuit," and legal actions were substituted for blood vengeance.[46] When traditional blood vengeance for rape took on a legal form that configured it as a wrong between men, the triangulated legal form offered men the status of legal subjects, while the harmed woman was reduced to an object of transfer or a

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Christian story of Adam and Eve, the Greek tragedy *The Oresteia*, Euripedes' *Antigone,* and the "quintessential story of patriarchy," *Oedipus*, "a trauma occurs in a triangle composed of two men and a woman," and the trauma is connected to the conflict that arises when "a father or a husband's authority is challenged." Eve and Adam disobey God, Atreus's wife and brother betray him, Antigone challenges Creon's authority through her fidelity to her brother, and Oedipus kills his father and marries his mother. When the patriarchal order of the triangle (man over woman, father over son) is challenged, a social (and psychic) rift develops that must be repaired if the social order is to be restored. According to the *Oresteia*, the substitution of the rule of law for blood vengeance is inextricably linked to the creation of the civic order of Athenian democracy. When "Orestes is acquitted for the crime of killing his mother at the first recorded trial," patriarchy is reinstated, and with this reinstatement, democracy and the rule of law come into being. CAROL GILLIGAN, THE BIRTH OF PLEASURE 6–7 (2002). Similarly, the republic of Rome also has a gendered triangulation as its founding myth, the rape of Lucretia. *See generally* MELISSA MATTHES, THE RAPE OF LUCRETIA AND THE FOUNDING OF REPUBLICS: READINGS IN LIVY, MACHIAVELLI, AND ROUSSEAU 4 (2001) (examining the subtle gendering of the foundations of republicanism, specifically "the intersection of speech and politics, of the origin and its repetitions, and of specularity and citizenship").

42. In some societies, women are still used as pawns in disputes between men and groups of men. For instance, in Pakistan, a feud between two family clans led to a tribunal's ruling that a woman from one clan (Mukhtar Mai) could be gang-raped by men of the rival clan to conclude the dispute. DISHONORED (Icarus Films 2007).

43. The story is found in *Genesis* 34:1–31.

44. For a discussion of how this story relates to concepts of vengeance, see Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1117 (2004).

45. *See* Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 837 (1995) (noting that seduction lawsuits, as a remedy for rape, advanced an "egalitarian ethos").

46. *Id. See also* Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389 (2003) ("The comparative element of compensation, which seeks to counterbalance rather than simply repair the wrong done to the claimant, has a close affinity to revenge.").

market commodity.[47] The women behind these suits function only as "a species of 'damaged goods'" or "contested object[s];" their voices form no part of the legal claim, and the man "seeks compensation for the injury to *him* caused by interference with his property interest" in his daughter, wife, or servant.[48]

C. Early Steps towards Recognizing Rape as a Personal Injury to Women

In the twelfth century, canon law began to take the first steps towards conceiving of rape as involving a personal injury to the woman, and provided that women could themselves access the public law, and initiate criminal redress for rape (as long as they fulfilled a number of onerous procedural hurdles).[49] Civil actions, however, were still available only to fathers, husbands, and masters.[50] When authorized to bring criminal prosecutions, women did so: for a brief moment in England in the thirteenth century, women brought most of the rape prosecutions.[51] If the prosecution was successful (which was not often), the convicted man would often be fined, and the money would go to the royal treasury.[52] Interestingly, though, if the harmed woman and the defendant were to settle before trial, she would usually be the recipient of some compensation.[53]

Despite the fact that sexually-based harms were the kind of intentional tort most likely to harm women, it was not until the mid-nineteenth century that women were able to access a civil remedy for sexualized battery.[54] The tort of seduction became the catch-all for sexual assault.[55] Like rape, seduction actions were initially available only to an authoritative male, the father, but in the latter half of the long nineteenth century, many states legislated that women could

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47. *See* KOROBKIN, *supra* note 31, at 93.

48. *Id.*

49. Thomas Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (Or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)*, 18 BUFF. J. GENDER L. & SOC. POL'Y 73, 79 (2009).

50. *See* VanderVelde, *supra* note 45, at 828.

51. Rape was one of three potential actions women could prosecute. The other two were for the homicide of her husband and for a personal assault. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN. 271, 271 (2002).

52. *Id.* at 277. Women's power to prosecute their own rapes came from the Statute of Westminster II. It was an exception to the usual norm, under which a husband or father would prosecute the rape on behalf of the female victim. *See* Stephanie Brown, Rape in Medieval England: A Legal History, 1272–1307, 1, 2 (2009) (unpublished M.A. thesis, Emory University), *available at* https://etd.library.emory.edu/file/view/pid/emory:1bbm 7/brown_dissertation.pdf.

53. Sometimes, the terms of the settlement were marriage between the victim and the perpetrator. Klerman, *supra* note 51, at 302. Klerman opines that the large number of rape prosecutions initiated by women in this period was in part because the jury was "expected to have gathered its evidence before trial," and thus the victim often did not have to testify to the details of the rape. *Id.* at 293.

54. VanderVelde, *supra* note 45, at 829.

55. *Id.*

bring seduction actions themselves.[56] Legal action around sexual predation and violence then appeared under the tort of seduction, rather than assault or battery.[57] Like rape, seduction also walked the line between a private and public wrong: as a tort, it often attracted substantial damages, and in some jurisdictions it was also a crime.[58]

In the early twentieth century, state laws began recognizing civil liability for rape in a more direct way.[59] This development was slow to evolve in part because of a pervasive conception of rape as a public wrong. Several states had criminal law doctrines "designed to discourage private recovery for what many considered a public wrong," and in many areas there was a "general cultural reluctance to transform so serious a public wrong into a claim for monetary damages."[60] These beliefs perpetuated the ironic result that for a long historical period, the "person *least able* to raise a claim as a civil cause of action was the person most injured."[61]

The explicit recognition of rape as a basis for civil liability did not immediately give rise to much civil litigation in this area. The few cases that existed in the mid-twentieth century generally focused solely on the defendant, and success rates were not high.[62] Beginning in the 1970s, though, more and more civil claims for sexual assault came before the courts, and as the decades passed, more and more of these claims involved third-party defendants.[63] Indeed, one study found that 74% of the published opinions for civil claims alleging sexual assault in the last forty years involved a third-party defendant.[64]

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56. Stephen Robertson, *Seduction, Sexual Violence, and Marriage in New York City, 1886–1955*, 24 LAW & HIST. REV. 331, 344 (2006). In the mid-seventeenth century, fathers sued for seduction under a "loss of services" framework, similar to that which governed enticements of servants. Seduction was also criminalized in many states. Larson, *supra* note 16, at 382–83.

57. VanderVelde, *supra* note 45, at 825. The public-private tension is evident here in another way, too. Some cases specifically stated that it was an error of law to allow what looked like rape to be treated as seduction. *See, e.g.*, Breon v. Hinkle, 13 P. 289, 296–97 (Or. 1887).

58. Larson, *supra* note 16, at 384 n.35 (noting that the damages awarded to plaintiffs in seduction actions were often substantial); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 18 (2012) (describing the criminalization of seduction).

59. Emily O'Brien & Alexandra Alvarez Minoff, *Rape*, 5 GEO. J. GENDER & L. 243, 252 (2004).

60. VanderVelde, *supra* note 45, at 824.

61. *Id.* at 828.

62. Bublick, *Tort Suits*, *supra* note 2, at 60.

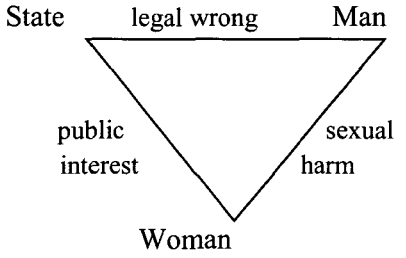
63. A number of factors likely helped spur this increase: the feminist movement of the 1970s brought more awareness to the prevalence and social harm of sexual assault, thus removing some of the stigma traditionally associated with it; new theories of third-party liability combined with more expansive insurance coverage suggested the potential for actual recovery of damage awards; and more concerted efforts from within the plaintiff's bar encouraged this type of litigation. Lininger, *supra* note 11, at 1560, 1570–71. *See generally* Jeannie Suk, *"The Look in His Eyes": The Story of* State v. Rusk *and Rape Reform* (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 10-23, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546602.

64. Lininger, *supra* note 11, at 1570. Lininger does warn, however, that his study may have "overemphasized recent cases" and involved a "higher proportion of third-party claims" because

III.
THE CRIMINAL TRIANGULATION

A. State v. Man, Regarding Woman

Although the rate of civil litigation for sexually-based wrongs is currently increasing, the vast majority of the law's involvement with sexual assault and rape takes place within the context of the criminal law system.[65] Like the historical legal actions for sexual assault, the criminal law also triangulates rape. This time, though, the triangulation is between the state, a male defendant, and the harmed woman. In this triangulation, the state takes the position previously held by the patriarchal male, and the state and the harmed woman are linked not by a proprietary interest, but through the *public* interest:



The criminal triangulation and the historical triangulation have many points of similarity. First, both schemas largely ignore the harmed woman's desire to engage in the legal process. A female victim who wants the criminal system to pursue justice on her behalf will often be denied access to this path. Her consent or willingness to engage the process "is neither necessary nor sufficient for a prosecution to be brought."[66] On the other hand, a female victim who does not wish to engage the criminal process will find her consent or willingness to pursue the process similarly meaningless: her unwillingness is not enough to

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those claims were more likely to result in published decisions. *Id.* at 1570 n.59.

65. *See id.* at 1615 (noting that the overall rate of civil litigation for rape is increasing).

66. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719 (2007). Although women have traditionally been expected to vigorously resist rape, and in that sense be active, once the attack has occurred, the moment for resistance has passed and women are once again to assume a role of feminine passivity in relation to the criminal law. For more on resistance requirements, see Murray, *supra* note 58, at 20 n.95 (noting that case law often required "some measure of resistance" as resisting was "the natural instinct of every proud female"). She cites at n.95:

> People v. Barnes, 721 P. 2d 110, 117 (Cal. 1986) ("The law demanded some measure of resistance, for it remained a tenet that a virtuous woman would by nature resist a sexual attack."); State v. Rusk, 424 A.2d 270, 733 (Md. 1981) (Cole J. dissenting) ("She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person . . . She must make it plain that she regards such sexual acts as abhorrent . . . .").

deter prosecution, either.[67] Indeed, as the Sixth Circuit of the United States Court of Appeals noted, a rape victim's role in a criminal prosecution cannot accurately be described as "voluntary."[68]

The criminal triangulation also mimics the historical triangulation in two additional ways. First, in both forms, the woman's role in the legal proceeding is overshadowed by that of the male participants. In the criminal triangulation, the face of the state—the prosecutors, judges, and police officers that process rape cases—are predominantly male, as are the defendants.[69] Other than as a witness, the harmed woman typically does not play a large role in the process. Indeed, in many instances, she will not only be figuratively absent from the legal process, she will literally be excluded from the courtroom for much of the trial.[70] The witness sequestration rule, strictly applied, holds that complaining witnesses should not hear the evidence of other witnesses and should not be in the courtroom unless they themselves are testifying.[71] Many prosecutors voluntarily follow this rule, "in order to make the evidence supporting their case as unassailable as possible."[72]

Secondly, in the criminal triangulation, the state, in assuming the responsibility of prosecuting the accused, is acting in a paternal manner similar to the old patriarchal figure. In its role as prosecutor, the state's "pattern[] of functioning"[73] involves "hierarchical rule and coercive authority"[74] that arguably has a gendered, masculine component. The result is a triangulation that both reflects a particular gender order and contributes to the structuring of that order.[75]

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67. Simons, *supra* note 66, at 719. Of course, it may have some effect, in that a prosecution with an uncooperative witness will be much more difficult.

68. The court states, "It cannot be said that a rape victim 'voluntarily' injects herself into a criminal prosecution for rape." Street v. Nat'l Broad. Co., 645 F.2d 1227, 1234 (6th Cir. 1981) (citing Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976)) (analyzing "voluntariness" for the purposes of a defamation action brought against a woman for her role testifying in a rape prosecution).

69. *See* Patricia Yancey Martin, *Gender, Accounts, and Rape Processing Work*, 44 SOC. PROBS. 464, 464 (1997) (noting that of the different roles men and women play in rape processing, the police officers are generally male, while nurses are often female).

70. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 677 (2009).

71. *Id.* (citing 75 AM. JUR. 2D TRIAL §§ 176–77).

72. *Id.*

73. Sandra Marshall, *Appendix: Feminists and the State: A Theoretical Exploration*, *in* FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE 93, 104 (Cynthia Daniels ed., 1997).

74. BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 118 (1984), *quoted in* Gruber, *supra* note 12, at 615.

75. Eve Sedgwick, in her work describing how male-male-female erotic triangles function in Victorian literature, theorized that the individual triangles, like the ones at play in the historical triangulation of rape, could be present in larger societal structures. She suggested that it was likely that "large-scale social structures are congruent with the male-male-female erotic triangles." SEDGWICK, *supra* note 9, at 25. The ways in which the criminal adjudication of rape replicates

In the criminal triangulation, the state and the harmed woman are linked through the public interest, rather than the old proprietary interest. In some ways, the public interest here functions like the proprietary interest did in the historical triangulation: it de-emphasizes the personal effect of the crime on the victim and focuses instead on the wrong to society.[76] The remedy further reflects this focus, as the convicted man is "expected to pay his debt to *society* rather than to his victim."[77] This debt to society is typically paid with the currency of time.[78] Although translating a wrong into time shares many of the same conceptual difficulties as translating a wrong into money, this temporal translation does not attract nearly the same cultural backlash.

B. Political Context: Perpetuating Current Gender Inequalities

The United States Supreme Court has stated that "[s]hort of homicide, [rape] is the ultimate violation of self."[79] Rape is a significant physical and psychological attack, and often understood as an attack upon the human personality itself.[80] It can result in serious long-term effects that radiate through nearly all aspects of the life of the assaulted.[81] Given the Supreme Court's ranking of rape as second to homicide in severity and given that criminal punishment can be seen as "a communicative act transmitting to the wrongdoer" and the community "how wrong his conduct was," one would expect rape to be vigorously prosecuted and severely punished.[82]

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many of the dynamics of the small-scale triangle suggests that this social structure shares many points of congruence with its smaller iteration. *Id.*

76. VanderVelde, *supra* note 45, at 842 (noting historical emphasis on the public wrong of rape rather than the private harm).

77. *Id.* at 846 (emphasis added). *See also* Elizabeth Adjin-Tettey, *Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery*, 39 U. B.C. L. REV. 3, 7 (2006) (describing rape as a harm "against the state with the complainant only being a witness in the case against the perpetrator").

78. Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik. Gopnik writes on time as punishment, looking at how "the presence of time as something being done to you, instead of something you do things with, alters the mind at every moment." *Id.* The criminal system does use other currencies in addition to time, like community service and probation.

79. Coker v. Georgia, 433 U.S. 584, 597 (1977), *quoted in* Deborah Denno, *Why Rape is Different*, 63 FORDHAM L. REV. 125, 125 (1994).

80. There is much debate over whether rape is actually "the ultimate violation of self," or whether such a view reflects antiquated notions of chastity and sexual purity as women's highest value. For a discussion of this issue, see generally Holly Henderson, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER L. & JUST. 225 (2007). In this article, I do not intend to take a normative position in this debate. Instead, I discuss the harm of rape only to discuss remedies, and the contrast between what the criminal justice system says and what it does.

81. *Coker*, 433 U.S. at 611–12 (Burger, C.J., dissenting) (1977), *described in* Denno, *supra* note 79, at 131.

82. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 289 (2007), *quoted in* Leslie Garfield, *The Case for a*

Against this backdrop, the continuing high numbers of sexual assault and the way that sexual assault is actually dealt with in the criminal justice system are deeply troubling. According to a recent study from the United States Center for Disease Control, 18.3% of women in the United States "have been raped at some time in their lives, including completed forced penetration, attempted forced penetration, or alcohol/drug facilitated completed penetration."[83] However, criminal proceedings rarely result, and even when they do, convictions are unlikely. Catharine MacKinnon summarizes the situation: "In the United States most rapes are never reported. Most reported rapes are not prosecuted. Most prosecuted rapes do not result in convictions. The vast majority of rapists are never held accountable for their actions in any way."[84]

Criminal law reform has been attempted and has even achieved some successes, but these doctrinal and evidentiary changes have not resulted in an increased number of prosecutions nor an increased rate of conviction.[85] Ultimately, it appears that the criminal justice system is "inadequate to the task of protecting autonomous choice about sexual intimacy."[86] Either the state cannot or will not create a criminal law regime that effectively addresses sexual assaults. The failure to redress rape in the criminal context has an important political consequence: it maintains the status quo.

Many have written about the impact rape has on women and gender inequality.[87] In particular, social scientists and theorists have examined how the prevalence of rape structures the relations between the genders.[88] Women learn

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Criminal Law Theory of Intentional Infliction of Emotional Distress, 5 CRIM. L. BRIEF 33, 36 (2009).

83. CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2010). Given this statistic, it is not surprising that the United States has one of the highest rates of reported rapes in the industrial world, even though most rapes are never reported at all. MICHAEL KIMMEL, THE GENDERED SOCIETY 397 (2011) (noting that the United States has among the highest rates in the industrial world for rape, domestic violence, and spousal murder).

84. CATHARINE MACKINNNON, SEX EQUALITY 751–52 (2007), *quoted in* Michele Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent & Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim is Non-Traditional*, 17 J. GENDER SOC. POL'Y & L. 41, 42 (2009). A recent report found that 98% of victims of rape never see their attacker caught, tried, and imprisoned. Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313, 325 (1993).

85. Bublick, *Tort Suits*, *supra* note 2, at 67 (noting that "criminal law reforms seem not to have meaningfully affected" numbers of prosecutions or convictions for rape).

86. *Id.* at 68.

87. Although the complexity and depth of the issue place it outside the scope of this article, it should be noted that rape law has also greatly impacted racial inequality. In particular, "Black men were made vulnerable to legal and extra legal violence by the identification of rape with a Black-offender-white-victim." Kimberle Crenshaw, *The Intersection of Race and Gender in Rape Law*, *in* WOMEN AND THE LAW 243, 243–247 (Libby Adler, Lisa Crooms, Judith Greenberg, Martha Minow & Dorothy Roberts eds., 4th ed. 2008).

88. *See, e.g.*, Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

that there is an "ever present threat of sexual violence," and this lesson affects many of their actions.[89] They learn behaviors regarding what a woman should and should not do with her drink in a bar, where she can and cannot walk at night, when she should or should not be alone with a man in his house.[90] Women internalize "a socially constructed . . . fear of sexual crime," and this fear "has served to constrain women's movement through the world—what we do, what we say, where we go, how we live—arguably to the benefit of men's interests."[91]

While women learn that they fall into the category of prey, men learn that they belong in the category of predator or protector.[92] "Men learn that they will be feared as a threat, valued as a protector, and that violence will be tolerated should they be so inclined. They also learn that if they resist norms of masculinity [like violence and toughness,] they put themselves at risk of shifting into the category of prey," and may themselves become vulnerable to sexual violence.[93] The failure of the criminal justice system to combat the prevalence of rape perpetuates these beliefs and behaviors, and ensures that the existing gender structure of society continues.

C. The Particular Problem of Acquaintance Rape

The criminal justice system is most likely to respond to cases involving what Susan Estrich once described as "real rape," or others have called "paradigmatic rape."[94] Real or paradigmatic rape involves a violent attack by a "highly aggressive male stranger," at night, outside, which makes the victim "extremely fearful."[95] These stranger rapes are "considered paradigmatic crimes perpetrated by monstrous criminals," criminals who are "predatory monsters deserving of the most brutal forms of punishment."[96] Prosecutors are most likely to pursue cases that fit this paradigm, for they resonate most loudly with the typical law functions of "deterrence, denunciation, separating perpetrators from

89. JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW 23 (2011).

90. *Id.*

91. *Id.* Catharine MacKinnon noted the relationship between nation-building and rape, stating "This is how states are made . . . . [T]his is one way communities are destroyed and states are created: by whom you can rape . . . . [This] is a part of a process through which nation-states have often been created." CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES (2006), *quoted in* Jose Alvarez, *MacKinnon's Engaged Scholarship*, 46 TULSA L. REV. 25, 27 (2010).

92. Gruber, *supra* note 12, at 609.

93. *Id.*

94. *Id.* at 599 (arguing that "nonparadigmatic rapes were underreported and underpunished").

95. Regina Schuller, Blake McKimmie & Marc Klippenstine, *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. REV. 759, 763 n.20 (2011).

96. Gruber, *supra* note 12, at 584, 594.

society, and ensuring the safety of complainants and other potential victims."[97]

However, even paradigmatic rape cases that involve "paradigmatic rape victims . . . and their hideous violators"[98] suffer from a lack of state funding and adequate resources. For instance, the creation of rape kits is often held up as an example of success in rape reform (in that the successful completion and testing of rape kits enables the gathering of appropriate evidence), but victims' access to rape kits is often limited and rape kit testing is not done in a timely manner.[99] Wasilla, Alaska, charged victims or their insurers for the cost of performing rape kits, thereby transferring the cost of this investigatory measure onto victims.[100] Furthermore, rape kit backlogs have prevented thousands of kits from being tested until well past the statute of limitations, meaning the potential cases each kit represents will never proceed.[101]

Additionally, many sexual assault cases have been massively mishandled. For example, in 1999, *The Philadelphia Inquirer* exposed the Philadelphia Police Department's practice of hiding sexual assault cases under a non-criminal classification code that meant such cases would never be pursued.[102] For nearly twenty years, Philadelphia's police department had deliberately misclassified thousands of sex crimes in this manner, which meant that approximately "one-third of all reports from the mid 1980s through 1998," were not properly investigated.[103] This mishandling was only exposed after it was revealed that a sexually assaulted and murdered woman was in fact one in a string of previous sexual assaults by the same offender, and that those previous assaults had not been investigated because of this practice.[104]

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97. Adjin-Tettey, *supra* note 77, at 6.

98. Gruber, *supra* note 12, at 639.

99. In Washington, D.C., in 2010, the police had to approve the dispersal of rape kits and would often withhold approval in circumstances of date or acquaintance rape. Amanda Hess, *Test Case: You're Not a Rape Victim Unless Police Say So*, WASHINGTON CITY PAPER, Apr. 9, 2010, http://washingtoncitypaper.com/articles/38671/test-case-youre-not-a-rape-victim-unless-police-say.

100. Kits cost between $500 and $1200. Ken Dilanian & Matt Kelley, *Palin's Town Used To Bill Victims for Rape Kits*, USA TODAY, (Sept. 11, 2008, 10:25 AM), http://www.usatoday.com/news/politics/election2008/2008-09-10-rape-exams_N.htm. *See also* Jordan Matsudaira & Emily Greene Owens, *The Economics of Rape: Will Victims Pay for Police Involvement?* (May 20, 2009) (preliminary draft), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407636 (estimating that the shift of the cost of approximately $1200 from the city government to victims reduced the number of reported rapes by between 50 and 80%).

101. Milli Kanani Hansen, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 COLUM. HUM. RTS. L. REV. 943, 944 (2011).

102. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Carol E. Tracy, Executive Director, Women's Law Project) (describing numerous other examples of disturbing police mishandling).

103. *Id.*

104. *Id.* She also provides many other examples of police departments mistreating sexual assault cases and notes that her organization sees "chronic and systemic patterns of police refusing to accept cases for investigation, misclassifying cases to non-criminal categories so that

For the allegations of sexual assault that do make it past the investigatory stage and into the courtroom, the criminal law's triangulation of the wrong as between the state, the male defendant, and the harmed woman has an unexpected result: it actually narrows the scope of responsibility for rape and constructs the wrong as part of a purely "binary relationship" between the accused and the victim.[105] The criminal law tends to reify the early modern view of sexual assaults as "anomalous individual acts, perpetrated by mentally ill men who had not adjusted to proper masculine norms, against women and children who more than occasionally invited such overtures or failed to protect themselves properly."[106]

In focusing on "stories about individuals, as opposed to complex systems and institutions,"[107] the criminal law obscures the role these systems and institutions play in sexual assault.[108] Using its discursive powers, the criminal law "'recasts social dynamics as characteristics of individuals.' (So, for example, the problem is a man's anger management, not economic inequality between men and women and the failure of the state to protect.)"[109] As Ana Gruber writes:

> The current dialectic of criminality and victimhood counsels that crime is a problem of individual criminal pathology and not social hierarchy. In this way, the criminal system obscures the economic and sociological conditions of rape and relieves "pressure on the government and society to remove the constraints on women's agency." Criminal law's unitary concern with victimhood and criminality absolves "[o]thers in a position to predict and prevent rape" and presumes immunity for "those who create an ideological system that makes rape possible." By engaging in the "false dichotomy" of agency and victimhood, the criminal law has the effect of decontextualizing rape from the larger issue of gender inequality.[110]

The narrative of rape as a crime perpetuated only by individual, deviant, monstrous men has another important effect: it elides the problem of

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investigations do not occur, and 'unfounding' complaints by determining that women are lying about being sexually assaulted." *Id.* In Canada, a police department was successfully sued for failing to warn women about a serial rapist targeting women in a specific neighborhood. *See* Melanie Randall, *Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of* Doe v. Metropolitan Toronto (Municipality) Commissioners of Police, 26 QUEEN'S L.J. 451 (2000).

105. Gruber, *supra* note 12, at 623.

106. CONSTANCE BACKHOUSE, CARNAL CRIMES: SEXUAL ASSAULT LAW IN CANADA, 1900–1975, 9 (2008).

107. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 436, 467 (2006).

108. Gruber, *supra* note 12, at 624.

109. NEDELSKY, *supra* note 89, at 68–9.

110. Gruber, *supra* note 12, at 624.

nonparadigmatic or acquaintance rapes.[111] Once rape is constructed as a problem of individual pathology, nonparadigmatic cases necessarily fall outside it.[112] These nonparadigmatic cases, though, actually form the vast majority of rapes; most rapes are not of the "stranger in the bushes" variety, but are instead acquaintance rapes committed by men who know or stand in some sort of social or other relationship to the harmed woman.[113]

These nonparadigmatic rapes attract neither the same powerful rhetoric nor the resources that paradigmatic cases do.[114] They are unlikely to appear in criminal court. The men that perpetrate them do not look like criminals; rather, they look like typical friends, neighbors, and acquaintances. Accordingly, there is a perceived disconnect between "the narratives justifying sex offender registration, civil commitment, residency requirements, and harsh punishments" and the picture of "the average college date rapist."[115] The situations that give rise to nonparadigmatic rapes also often look more like situations where consensual sex occurs, and so the conduct is more likely to be characterized as an "imperfect sexual encounter" than as the crime of rape.[116] The behaviors and beliefs about behaviors that underlie date or acquaintance rape, like "male goal-orientation and female coyness, are clearly sexist but they are far from deviant."[117] These nonparadigmatic cases are unlikely to be pursued criminally, and when they are, they are unlikely to result in convictions.[118]

IV.
THE TRIANGULATED CIVIL ACTION

A. Woman v. Man and Third-Party Entity

Although the criminal law has failed to adequately address rape (particularly acquaintance rape), it nevertheless remains the dominant structure of rape law.

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111. *Id.*

112. *Id.* at 585.

113. *See* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 35-6, *available at* www.ncjrs.gov/pdffiles1/nij/183781.pdf; Martha Burt, *Rape Myths*, *in* CONFRONTING RAPE AND SEXUAL ASSAULT 129, 130 (Mary E. Odem & Jody Clay-Warner eds., 1998)

114. Gruber, *supra* note 12, at 638.

115. *Id.* at 641.

116. *Id.* at 644.

117. *Id.* at 643.

118. See ROBIN WARSHAW, I NEVER CALLED IT RAPE 144 (1988), *cited in* Bublick, *Tort Suits, supra* note 2, at 57, for a discussion of how the failure of the criminal law to address acquaintance rape is likely connected to the low reporting rate. For a discussion of how current estimates suggest that only 14% of victims report their sexual assaults to the police, see Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565, 565 (2010). Finally, for a discussion of how the most common reason given by those who choose to not report is that they consider it a "private or personal matter," see Myrna Raeder, *Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?*, 6 INT'L COMMENT. ON EVIDENCE 1, 8 (2011).

Most rapes, if they do make it into the legal system, will come through this forum. However, more and more women are now advancing civil claims as well, either as an alternative or a complement to criminal prosecution.[119] Women "have brought tort claims" both "when criminal prosecution was unsuccessful," and "also when criminal prosecution was not pursued."[120] The majority of these claims take the form of triangulated civil cases.[121] They are brought by a female plaintiff against an individual defendant and a corporate or institutional third party.[122]

These claims offer a number of procedural and doctrinal advantages over criminal adjudication.[123] In civil court, the burden of proof is lower; procedural protections are not weighted in the defendant's favor; both parties have equal rights of discovery; both parties may or may not have legal representation; the plaintiff controls the process and strategy and decides whether or not to issue a claim; and the plaintiff has the potential to receive remedies beyond just monetary compensation, like apologies or the relocation of the defendant.[124] Perhaps most significantly, the fact that there is no tort of rape, and rape is instead brought under broader torts like assault, battery, false imprisonment, or intentional infliction of emotional distress, means that a grossly intrusive technical interrogation into "insufferable details about exactly which digit touched which orifice" will usually not be necessary to make out the elements of

119. In her discussion of tort claims for sexual assault in the United Kingdom, Nikki Godden expresses concern that addressing acquaintance rape in the context of private law will essentially create two categories of rape: criminal rape and civil rape. Nikki Godden, *Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?*, 22 KING'S L.J. 157, 177 (2011). However, this two-tier structure already exists within criminal law in the American criminal justice system. Currently, acquaintance rapes are not often pursued in that forum. Thus, the choice may be between a civil remedy for acquaintance rape and no remedy at all.

120. Bublick, *Tort Suits*, *supra* note 2, at 64.

121. In some circumstances, there will be no appropriate third party and a party may want to consider her tort options against the individual defendant solely. For a consideration of the advantages of seeking a tort remedy in these situations, see generally Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479 (1979) (discussing the advantages to the sexual assault victim of a civil law remedy); Holly Manley, *Civil Compensation for the Victim of Rape*, 7 COOLEY L. REV. 193 (1990) (arguing that civil suits help the victim regain control and have an expressive function in that they signal to the public that rape victims are no longer willing to remain silent about rape); and Nora West, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis*, 50 U. TORONTO L. REV. 96 (1992) (discussing tort suits for rape in the Canadian context).

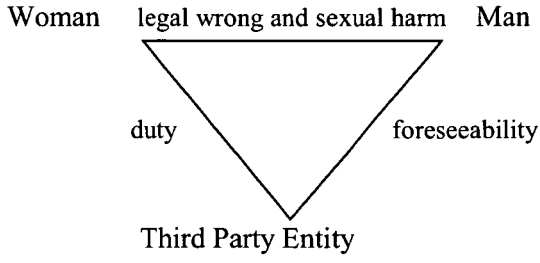
122. For an analysis of the doctrinal aspects of the duty and foreseeability components, see Chamallas, *supra* note 6, at 1373, which discusses the responsibility of third-party institutional actors, and Bender & Lawrence, *supra* note 84, at 326, which argues for the inclusion of women's perspectives and experiences in duty and foreseeability analysis.

123. Of course, there are some disadvantages, too. For instance, civil litigation can take years, the victim may still be required to reveal details about her sexual life, and issues regarding the applicability of rape shield evidentiary rules remain unresolved in many states. Bublick, *Tort Suits*, *supra* note 2, at 76.

124. *Id.* at 72–74. I use remedy in the broad sense, meaning anything that the plaintiff considers to be a remedy, including all aspects of settlement.

the tort.[125]

In addition to offering these procedural and doctrinal advantages and providing access to the empowering, expressive, and normative powers of civil litigation generally, the civil legal triangulation has special significance when compared to the past triangulations of rape law. Civil triangulation takes the following general form:



In this triangle, the harmed woman occupies the position held first by the patriarchal male, and then by the state. She is connected to the third party not through another person's proprietary interest, or through the state's public interest, but through a duty owed to her under negligence law. Moreover, whereas in each previous triangulation the person who experienced the sexual harm was disconnected from the assertion of the legal wrong, in this civil triangulation the legal wrong and sexual harm are finally bound together.[126] In this triangulation, the harmed woman is configured as a full legal and political subject, empowered in her interaction with the defendants, able to narrate her own claim, and potentially able to achieve a remedy that is meaningful to her.

1. Subjectivization

Unlike the historical and criminal triangulations, where the harmed woman's role in the legal process is basically peripheral, this triangular structure configures women as full legal subjects. These civil litigation cases are built upon a subject-subject (and third-party subject) framework, rather than the subject-object framework that dominates the historical and criminal triangulations.[127] This framework grants subjectivity to the harmed woman. Achieving subjectivity in the context of sexual assault is particularly important, given that rape and sexual assault are themselves a form of objectification. They objectify through power exploitation, where "the more powerful party may impose his or her will on the other, regardless of the other's desires and interests.

125. *Id.* at 73 (noting that a minority of jurisdictions have created specific sexual torts, some of which are problematic in that they import technicalities from the criminal law).

126. In the historical triangulation, the sexual harm was done to a woman but the legal wrong was done to the patriarch, and in the criminal triangulation, the sexual harm was done to a woman but the legal wrong was done to the public.

127. Henderson, *supra* note 80, at 232.

Such an act reflects an implicit claim of superiority by the more powerful actor, and an affront to the victim."[128] Through imposing his will on another, a male enhances his masculine subjectivity, while at the same time he objectifies the woman. Further, when a male imposes his will on a woman, he renders her invisible, both literally, in the sense that "the perpetrator 'covers' her," but also figuratively, in the sense that the rape harms her subjectivity.[129]

Bringing a civil suit resists this objectification process. Through a civil action, a woman subverts the power structure "by challenging the actions of a powerful aggressor."[130] Further, she asserts her own ability to seek redress and indicates that she is unwilling to act in a subordinate role to a prosecutor in a criminal case.[131] Ultimately, the civil action allows her to assert her inherent dignity. Dignity can be viewed as "a *status*-concept: it has to do with the *standing* (perhaps the formal legal standing or perhaps, more informally, the moral presence) that a person has in a society and in her dealings with others."[132] It is the "status of a person" that means in part that she "has the wherewithal to demand that her agency and her presence among us as human beings be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally."[133] In a civil triangulation case, a harmed woman can affirm that she has such standing and status.

2. Empowerment

Essentially, tort law empowers those who have been harmed in legally cognizable ways to seek redress.[134] A harmed woman can assert her standing and status because the tort action provides her with mechanisms that force the individual defendant and the third party "to heed her complaint, deal with her accusations, and acknowledge the wrongfulness" of the harm done.[135] The defendants "must listen and respond" to the claim, or face the consequences of failing to do so.[136] In this legal interaction, there is a different power differential than in the original assault: "in court, as opposed to the original occurrence, the victim is in control of the interaction."[137] This kind of empowerment is

128. Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 961 (2009).

129. SABINE SIELKE, READING RAPE: THE RHETORIC OF SEXUAL VIOLENCE IN AMERICAN LITERATURE 4 (2002).

130. Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1604 (2007).

131. Lininger, *supra* note 11, at 1585.

132. Jeremy Waldron, *How Law Protects Dignity* 2, (New York Univ. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 11-83, 2011), *available at* http://ssrn.com/abstract=1973341.

133. *Id.* at 3.

134. Perry, *supra* note 128, at 961.

135. *Id.* at 982.

136. *Id.* at 983.

137. *Id.*

particularly important because many victims experience civil trials as a re-creation of the assault.[138] Women speak of wanting "to confront the aggressor in a 'secure space,' as though it were a playback of the aggression, where the survivor is given more power. It is a recreated scenario where the power is distributed differently, where the survivor controls more of the interaction."[139] Moreover, since many of these cases involve traditionally disempowered, "vulnerable victims, including children, the permanently or temporarily disabled, and the infirm," empowerment is especially significant in the sexual assault context.[140]

3. Narration

In addition to empowering the plaintiff in this manner, the triangulated civil action also provides for another form of empowerment: *telling*.[141] Plaintiffs in civil cases often have a deep need to be *heard*, and fulfillment of this need requires "the ability to present one's undistorted and uninterrupted account of the events, including facts, views, and feelings."[142] Sharing a story with others can be an important part of the healing process: "bearing witness to the trauma," and "transforming traumatic memory into a narrative that can be worked into the survivor's sense of self and view of the world" is essential to "working through, or remastering, traumatic memory" and thereby shifting from "being the object or medium of someone else's (the perpetrator's) speech (or other expressive behavior) to being the subject of one's own."[143] The triangulated civil action meets the plaintiff's narrative need and provides her with a "neutral and dignified arena" in which to tell her story.[144] In contrast to her diminished narrative position in the criminal or historical triangulations, the plaintiff is the subject of this legal story.

4. Personal Remedy

Both the historical and criminal triangulations directed the remedy towards someone other than the harmed woman. In the historical triangulation, the remedy was directed at the authoritative male, and in the criminal triangulation, the remedy is directed at the public. In the civil triangulation, however, the remedy is directed at the person who suffered the harm, the plaintiff.

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138. Nathalie Des Rosiers & Bruce Feldthusen, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Justice System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 439 (1998).

139. *Id.*

140. Bublick, *Tort Suits*, *supra* note 2, at 67.

141. *Id.* at 980–81.

142. Perry, *supra* note 128, at 980.

143. NEDELSKY, *supra* note 89, at 216 (quoting SUSAN J. BRISON, AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF 68 (2002)).

144. Perry, *supra* note 128, at 980.

The standard remedy in the civil system is compensation. But, because the current face of rape in the law is the monstrous deviant predator who randomly attacks strangers, the remedy most often thought of as appropriate for rape is criminal punishment, typically in the form of incarceration. As outlined in Part II, though, most rapes do not fit this model, and criminal conviction and punishment are not how most sexual assaults end. Currently, the most likely result of a sexual assault is that the law will never redress it. Given this reality, the debate is not really one of compensation versus criminal punishment, but rather one of compensation versus no remedy at all.[145]

Compensation as a remedy has multiple expressive and practical functions and benefits. It "constitutes recognition of the violation of a victim's bodily autonomy and dignity," compensates for "tangible and intangible harms," and "serves punitive and deterrence purposes."[146] Damage awards can give plaintiffs a "symbolic victory," a legal acknowledgement that there was a wrong committed.[147] As their purpose is to "make the plaintiff whole," compensatory awards can also alleviate the financial burden associated with treatment in the aftermath of sexual assault, and minimize the financial impact of the assault.[148]

However, the appropriate measure and apportionment of damage awards is often contentious and inconsistent.[149] In triangulated civil claims between 2001 and 2004, the majority of compensatory damage awards were between one hundred thousand and two hundred thousand dollars.[150] There have also been a number of more substantial verdicts, including awards of over one million dollars,[151] and a recent study found that the average damage award was closer to six hundred thousand dollars.[152] Further, some cases resulted in large punitive damages against the individual defendants.[153] In other cases, though, "the court or jury awarded no damages at all,"[154] a conclusion that is particularly

145. As Bublick notes, "whether tort litigation would be a second-best solution to the criminal law depends on one crucial factor—what the criminal law would actually have done." Bublick, *Tort Suits*, *supra* note 2, at 75.

146. Adjin-Tettey, *supra* note 77, at 8.

147. Sherwin, *supra* note 46, at 1405. Most successful plaintiffs will be able to recover their damage awards from third parties. Recovering these awards from the individual defendants who perpetrate the wrong, however, can be difficult. Liability insurance typically does not cover intentional torts, and although some individual defendants may have the means to satisfy a judgment, many will not. Bublick, *Tort Suits*, *supra* note 2, at 100.

148. Catherine A. Carroll, *Addressing the Civil Legal Needs of Sexual-Assault Victims*, 58 WASH. ST. B. NEWS 21, 22 (2004).

149. Bublick, *Tort Suits*, *supra* note 2, at 95. There have also been problems with courts undervaluing women's injuries. For a discussion of the way that tort law treats claims made by members of marginalized groups, see generally MARTHA CHAMALLAS & JENNIFER WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW (2010).

150. Bublick, *Tort Suits*, *supra* note 2, at 96–97.

151. *Id.* at 97.

152. Lininger, *supra* note 11, at 1569.

153. Bublick, *Tort Suits*, *supra* note 2, at 81.

154. *Id.* Interestingly, "[p]unitive damages in nineteenth-century America protected the

problematic when one considers that damages serve as "a signal of the social worth of plaintiffs and a societal measure of their suffering."[155]

While compensation is an appropriate remedy for many plaintiffs, others reject the idea that financial compensation can remedy the harm they have suffered. They look at compensation as a form of "blood money."[156] For example, some Holocaust survivors refused to accept German reparations, and some Korean women forced into prostitution in World War II refused to accept compensation from the Japanese.[157] To them, blood money merely commodified their pain, and they experienced this translation of their pain into economic terms as a further objectification: "[n]ot only were they hurt, but that hurt could be bought. The infinity of anguish could be measured; owned."[158] In their view, compensation was not "a recognition of the harms which they were forced to suffer," but a derogation of them and their loss.[159]

In such cases where the victims are uncomfortable with the idea of receiving monetary compensation or situations where compensation is simply unavailable, triangulated tort claims can allow victims the flexibility to "shape the litigation to meet their personal objectives."[160] In the context of settlement negotiations, victims can obtain goals unrelated to monetary compensation, like apologies, "or the assailant's transfer to a different university, apartment complex, or job," or a change in policies and procedures that could help prevent future harms.[161] In settlement negotiations, victims can bargain for outcomes like these,[162] and plaintiffs can feel that they are advancing the public interest by prompting "third-party defendants to take precautionary measures that could prevent future rapes" or by effecting changes in the way institutions address sexual assault complaints.[163] Plaintiffs have successfully convinced apartment building owners to improve their security, persuaded employers to engage in heightened supervision and more thorough background checks, and caused other entities to

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sanctity of the family as a social unit from such external threats as seduction, loss of services, and criminal conversation. Familial crimtorts in the modern period generally punish oppression within the family, not external threats to the family unit. Today, wives and children receive punitive damages for familial sexual abuse and other torts by family members." Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 302–03 (1998).

155. CHAMALLAS & WRIGGINS, *supra* note 149, at 5.

156. LAURA BLUMENFELD, REVENGE: A STORY OF HOPE 96 (2002), *quoted in* Eisenstat, *supra* note 44, at 1160.

157. BLUMENFELD, *supra* note 156, at 96.

158. *Id.*

159. Eistenstat, *supra* note 40, at 1162 (referencing Ralph Ranalli, *Victims Agonize Over Church Deal; Struggle with Moral, Legal Questions About Accepting Settlement*, BOSTON GLOBE, Oct. 8, 2003, at B1, which tells the story of victims of clerical sexual abuse in Boston deciding whether to accept the Archdiocese's $85 million settlement).

160. Bublick, *Tort Suits*, *supra* note 2, at 73.

161. *Id.* at 74.

162. *Id.*

163. Lininger, *supra* note 11, at 1565.

change their complaint procedures.[164] Such safeguards can help prevent future assaults.[165] Also, within this process of negotiation, there can be a recognition of the "traumatic event and its consequences," as well as an "assignment of responsibility for the harm."[166] These factors may "exert a powerful influence on the ultimate resolution of the trauma," even without compensation payments.[167]

Remedies like changes in security procedures and changes in complaint-handling procedures can play an important role in reconstructing a plaintiff's self in relation to others. Many rape victims struggle to reconnect with society after the assault.[168] Because most perpetrators of sexual assault know their victims, the victim may feel she needs to "withdraw from some part" of her social or professional world.[169] Creating changes in those worlds through the settlement process can provide victims with a sense of reintegration into the community.[170]

B. Political Potential

As is clear from its history, rape is both a private and a public wrong. However, these very categories are problematic. Tort law involves not just a relation between plaintiffs and defendants, but also between these parties and the state. Accordingly, there is always an inherent publicness to this area of "private" law.[171] Further, private law often has a public policy dimension, rendering the distinction between private and public slippery at best, and making "[d]elineating where the private ends and the public begins . . . a notoriously challenging intellectual and practical exercise."[172] The private and the public "cannot be neatly or decisively demarcated in law, nor in other aspects of social life."[173] Simply put, "there is no 'public/private distinction.'"[174] Instead, there is

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164. *Id.* at 1565, 1576.

165. *Id.* at 1576. *But see* Mary Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANN. N.Y. ACAD. SCI. 206, 216 (2006) ("Because settlements are private, tort actions in the case of rape fail to achieve not only the aims of public justice, but also the prevention and community norm change goals of the antisexual assault advocacy community. Private justice fails to validate the SV among her family, friends, and community as a legitimate victim and does not express public condemnation of wrongful conduct. Additionally, private justice does not contribute to individual and general deterrence of future offenders by imposing sanctions that may outweigh any perceived benefits of criminal sexual conduct.").

166. Perry, *supra* note 128, at 987.

167. *Id.*

168. NEDELSKY, *supra* note 89, at 215.

169. *Id.*

170. *Id.*

171. Helge Dedek, *Of Rights Superstructural, Inchoate and Triangular: Some Remarks on the Role of Rights in Blackstone's Commentaries*, *in* RIGHTS AND PRIVATE LAW 186 (Donal Nolan & Andrew Robertson eds., 2011).

172. Randall, *supra* note 104, at 455.

173. *Id.*

174. Karl Klare, *The Public-Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982) (discussing the absence of a true distinction between public and private in labor law), *quoted in* Ruth Gavison, *Feminism and the Private/Public Distinction*, 45 STAN. L. REV. 1, 11 n.25 (1992).

only "a series of ways of thinking about public and private that are constantly undergoing revision, reformulation and refinement."[175] The false distinction mainly serves as a form of political rhetoric, one whose "social function . . . is to repress aspirations for alternative political arrangements by predisposing us to regard comprehensive alternatives to the established order as absurd."[176] The public/private distinction is perhaps best understood then "as an ideological marker that shifts in relation to the role of the state at particular historical moments, in particular contexts and in relation to particular issues."[177]

Issues of gender and sexuality have long been situated in the nodal realm between public and private, and arguments that certain wrongs are public and other wrongs are private have had particular political consequences, some positive and some negative. For example, domestic abuse and marital rape persisted unchecked for so long partly because they were labeled as private.[178] Categorizing them in this manner hid the connection between them and the broader social world.[179] On the other hand, adultery has often been pulled into the public world, and when it has been, it has typically attracted severe punishment and has not affected gender equality in a positive manner.[180]

The net result of emphasizing rape as a "public" wrong that should be addressed within the criminal law system has been that most rapes go unreported, uninvestigated, and unredressed. Reasserting that sexual assault is also a private law wrong that can be appropriately addressed in the tort system may be able to change the reality. Ironically, using private law in this manner may affect the existence of rape as a public wrong in another important sense. Rape is a public wrong in that it is the kind of wrong that reflects a particular structural inequality deeply embedded in society generally. It is "the kind of wrong that would not and could not be committed but for the fact that the community in which they occur is affected by a particular kind of character flaw, such as being [. . .] patriarchal in character."[181] In order to fix this kind of public

175. Randall, *supra* note 104, at 455–56.

176. Klare, *supra* note 174, at 1361, *quoted in* Gavison, *supra* note 174, at 11 n.25.

177. Susan Boyd, *Challenging the Public/Private Divide: An Overview*, *in* CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY 3–4 (1997), *quoted in* Randall, *supra* note 104, at 455–56.

178. *See* Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J. L. & PUB. POL'Y 144 (2010).

179. *See id.*

180. *See, e.g.*, BRUNDAGE, *supra* note 17, at 388 (describing punishments of adulterous women in the eleventh century that included shaving their heads, parading them publicly with torn clothes, and whipping them publicly).

181. Michelle Madden Dempsey, *Public Wrongs and the "Criminal Law's Business": When Victims Won't Share*, *in* CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF 269 (2011). Here, patriarchy appears to mean men's domination of women. Regardless of terminology, there is an inverse relationship between gender equality and rape: societies that have high instances of sexual assault tend to have less gender equality. Further, societies in which women have low status are typically plagued with poverty and other social problems. *See generally* NICHOLAS D. KRISTOF & SHERYL WUDUNN, HALF THE SKY: TURNING

wrong, the community itself must be changed.

1. The Triangulated Claim as Crimtort

While public law is the most obvious way to get at public harms and effect changes in a community, private law can also serve this purpose. So-called "crimtorts" are a good example of private law serving a public purpose. Crimtorts enable "private litigants [to] serve the public good when they 'expose and financially punish entities that commit torts causing 'group injuries,' that are not rectified on the criminal side of the docket.'"[182] In this way, crimtorts represent "the expanding middle ground between criminal law and tort," and "the synergistic combination of public and private law purposes" that occur at this nexus.[183] They arm ordinary citizens "with the power to return society to equilibrium,"[184] rather than placing that power in the hands of a government prosecutor. Here, the plaintiff acts as a "private attorney general who seeks civil recourse but also fulfills a broader purpose of identifying and punishing reckless corporate defendants."[185] It is a bottom-up approach, rather than a top-down one.[186]

Civil actions for abuse in nursing homes serve as a helpful illustration of a triangulated crimtort, as do the civil actions for child sexual abuse by members of the clergy.[187] In both of these examples, a traditionally vulnerable group was able to use private law to effect widespread systemic change. In the nursing home context, elderly residents "suffered catastrophic injury that was the functional equivalent of manslaughter."[188] The homes represented a threat to public safety, as well as obviously perpetrating private wrongs upon those that relied on their services.[189] Civil actions against these homes revealed their harmful practices, and the homes changed their protocols as a result.[190] Now, nursing homes have a recognized "obligation to use reasonable care to protect their patients from foreseeable sexual assaults."[191] The child sexual abuse cases in the Catholic Church reflect a similar pattern. As Timothy Lytton describes,

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OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE (2009) (discussing the global struggle for women's equality).

182. Michael Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 525–26 (2011) (quoting Thomas Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 735 (2008)).

183. Rustad, *supra* note 182, at 525.

184. Koenig, *supra* note 182, at 733.

185. Rustad, *supra* note 182, at 440. While Koenig and Rustad focus on punitive damages as the primary means by which public purposes can be achieved, the concept is arguably elastic enough to encompass liability itself.

186. *Id.*

187. *Id.* at 475, 526.

188. *Id.* at 527.

189. *Id.* at 527 n.600 (describing harms done to the elderly residents of nursing homes).

190. *Id.*

191. Bublick, *Tort Suits*, *supra* note 2, at 61.

clergy sexual abuse litigation resulted in increased awareness of this type of sexual abuse, revealed the high level of institutional responsibility and complicity in the abuse, and ultimately resulted in systemic policy and procedural changes that helped to protect against future abuses.[192]

By broadening the contextual frame of sexual assault, and exposing the role of third-party entities in creating realities that facilitate rape, triangulated civil claims for sexual harms can function as crimtorts. Through triangulated sexual assault claims, women can target the public and private aspects of the harm.[193] These suits show how sexual harms occur in part because institutions and corporations create the space and climate for them to happen. Moreover, these suits can create large-scale change by making institutions and corporations change those spaces and climates, and change the messages that they send regarding the acceptability of sexual assault.

2. Third Party Responsibility

a. Failing to Protect Against Rape

Prior to the 1970s, courts "did not expect anyone but the assailant or the victim to prevent the assault."[194] Since that time, however, society has begun adopting a deeper understanding of social responsibility, and multiple responsibility, for certain wrongs.[195] For instance, outside of the sexual assault context, there have been successful tort suits brought against not only the defendants who use guns to commit crimes, but also against the gun manufacturers who allow their products to be readily accessed for illegal purposes.[196] The increase in civil litigation for sexual assault generally, and in the addition of corporate or institutional third parties specifically, is linked to "the broadening understanding of social responsibility for sexual assault prevention."[197] Now, since the 2000s, many cases are "concerned with

192. TIMOTHY LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 7 (2008) (responding to criticism of tort litigation as a strategy for systemic change and victim compensation).

193. *But see* Nicola Godden, Rape and the Civil Law: An Alternative Route to Justice 52 (2009) (unpublished M.A. thesis, Durham University), *available at* http://etheses.dur.ac.uk/252 (arguing that "tort law misrepresents the nature and extent of certain harms because it frames them in terms of isolated acts against an individual").

194. Bublick, *Tort Suits*, *supra* note 2, at 60.

195. *Id.*

196. Robert Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 435–38 (discussing the court's ruling in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)).

197. Bublick, *Tort Suits*, *supra* note 2, at 60 (noting that the "sense that responsibility for sexual assaults should not be limited to criminal assailants marks a significant change in causal attribution which has considerable potential to steer tort law in an egalitarian direction"). The broader understanding of responsibility in general can also be seen in what Robert Rabin termed the "enabling torts." In these torts, manufacturers of dangerous products like guns and tobacco can be held partly responsible for the harms that their products cause. Rabin, *supra* note 196, at 438. This same trend can also be seen in the jurisprudence surrounding Title VII, under which

institutional responsibility to affect the conditions that make sexual assault prevalent and largely unsanctioned."[198]

Third parties can fail to protect against rape in a number of ways. An employer may fail to adequately vet its employees;[199] a landlord may leave apartment keys easily accessible to workers and members of the public;[200] a corporation may fail to train security personnel to properly respond to situations involving sexual assault;[201] a treatment center may fail to warn members of an alcohol treatment group that one member has a propensity towards sexual violence when drinking;[202] or a medical center may not provide adequate supervision of staff and patients.[203] Generally, entities and institutions in some ways encourage rape and sexual assaults by failing to take complaints of sexual misconduct seriously, failing to implement certain safeguards, or otherwise tolerating environments of sexual hostility. In particular, the ways that corporations and institutions respond (or do not respond) to allegations of sexual assault send important messages about its acceptability.[204] In these and other circumstances, courts have engaged in nuanced analyses of duty, foreseeability, and causation that allow for a broad consideration of how and why sexual assaults occur.

b. Reinforcing Masculinity Norms

Another way that third-party institutions and entities contribute to sexual assault is through enforcing and encouraging norms of dominant masculinity. One way of understanding rape is as a practice performed for other men. By inflicting this type of personal injury on women, men demonstrate their

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employers can be liable for the conduct of third-party harassers. *See generally* Noah Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009).

198. Bublick, *Tort Suits*, *supra* note 2, at 61.

199. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003), *cited in* Bublick, *Tort Suits*, *supra* note 2, at 86.

200. Doe v. Linder Constr. Co., 845 S.W.2d 173 (Tenn. 1992), *discussed in* Bender & Lawrence, *supra* note 84.

201. Bender & Lawrence, *supra* note 84, at 86 n.200 (citing L.A.C. v. Ward Parkway Shopping Ctr., 75 S.W.3d 247 (Mo. 2002)).

202. Bryson v. Banner Health Sys., 89 P.3d 800 (2004) (holding that a substance abuse treatment facility owed a duty of care to protect a female patient from sexual assault by another patient in treatment at the facility).

203. Bublick, *Tort Suits*, *supra* note 2, at 87–88 (citing N.X. v. Cabrini Medical Ctr., 765 N.E.2d 844 (N.Y. 2002)).

204. For instance, in the wake of the Penn State child sex scandal, the actions of the University have been carefully dissected in order to distill a message of either denunciation or complicity. For instance, the termination of Coach Joe Paterno, who is alleged to have failed to act on his knowledge that a colleague sexually assaulted children, was largely understood in terms of its expressive function. A civil suit is pending against Penn State from at least one alleged victim. Bill Pennington, *Penn State Officials, Including Paterno, Could Face Civil Lawsuits*, N.Y. TIMES (Nov. 11, 2011), http://www.nytimes.com/2011/11/12/sports/ncaafootball/penn-state-officials-including-paterno-could-face-civil-lawsuits.html?_r=0.

dominance and masculinity.[205] "Masculinities are relational," and men perform masculinity because of and for other men, even when those other men are not literally present.[206]

The ways in which rape connects to masculinity and dominance is most obvious in situations where other men are actually present for the sexual assault, as in group rape or rape in war. In her historical overview of rape in the Canadian context, Constance Backhouse notes that "[g]ang rape has been an all-too-common feature of sexual assault, with groups of three or more men charged regularly in cases that span the century and stretch across the country," an insight that is echoed in research on rape in the United States.[207] Group sexual assault is a common feature of many rapes, particularly when gang members are involved.[208] As early as 1958, approximately 27% of reported rapes were group rapes, and another 16% of reported rapes were pair rape.[209]

Rapes that involve groups serve as a medium for the members of the group, a way for them to interact and perform for each other.[210] The "objective of a gang rape is to perform sexually in front of an audience;" the other men witness the performance and can therefore confirm the masculinity of the actors.[211] The father of a student at Glen Ridge High School, where four members of the football team sexually assaulted a mentally disabled girl, stated it well: "If I think back about that period, I can see the group [of high school guys] getting stronger, closer, every time they got together and humiliated a girl . . . What they enjoyed in common wasn't football. This was their shared experience. For them, this was what being a man among men was."[212]

In the context of war, group rape is part of the negative hegemonic masculinity associated with being a soldier. The "theatre of war" is one of the primary scenes of "masculinity's hegemonic performance," making it an

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205. *See generally* Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J. L. & GENDER 431 (2010) (discussing the role of men's practices in constructing masculinity).

206. *Id.* at 455.

207. BACKHOUSE, *supra* note 106, at 60; Christopher Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 LAW & PSYCHOL. REV. 91, 93 (2010).

208. Kendall, supra note 207, at 93.

209. *Id.*

210. Kimberly Allen, *Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 GEORGETOWN L.J. 837, 839 (2011).

211. Despite the key role that the audience members play in these types of rape, "[t]he [criminal] law does not touch the group member who intentionally watches and enjoys the gang rape; indeed, even aiders and abetters who cheer on the rapists, who snap photos, or who otherwise facilitate the gang rape, are rarely held accountable. In other words, the law ignores the motivating role that 'spectators' play in gang rapes." *Id.* at 839. However, such instances are another situation where tort law may impose liability that the criminal law cannot. For example, in *Weldon v. Rivera*, 301 A.D.2d 934 (N.Y. App. Div. 2003), a co-defendant who watched and kissed the plaintiff during the assault was held liable on the theory of concerted action.

212. Allen, *supra* note 210, at 838 (quoting BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 138 (1997)).

important site for sexual domination.[213] Rape in war is a "symbolic message of dominance to the conquered (men) and to all women."[214] It binds together the soldiers doing the raping, separates them from the weaker men who have lost their women, and confirms them as more powerful than the raped women.[215] Through rape in war, men establish themselves as masculine victors.[216] Rape is endemic to war, and to the military in general.[217]

Many other institutions and corporations play a significant role in creating environments that make it more likely rape will occur. In addition to the military, rape and sexual assaults are particularly prevalent in institutions with cultures that value dominance and masculinity including policing, college football, and prison.[218] Fraternities, too, have been implicated in creating environments that condone or facilitate rape.[219]

Institutions, corporations, and other third-party entities exist within this world of normalized male violence, and they can contribute to it through policies that ignore sexual wrongs, spaces that hide violence, and procedures that fail to address sexual harms. Triangulated claims contextualize the acts of an individual within the environment and circumstances that allow those acts to occur. They expose the norm-setting role of institutions and corporations, and show how institutions and corporations can actively discourage sexual assault through different procedures and actions. By responding to sexual assault in a less tolerant way, corporations and institutions can send a message that such behavior is not appropriate, and not within the range of normal masculinity.

The recent scandal at Penn State University illustrates the role that institutions can play in sexual wrongs. According to the grand jury findings, in 2002 a graduate assistant coach witnessed a ten-year-old boy "being subjected to anal intercourse" by coach Jerry Sandusky in the shower of the locker-room.[220]

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213. Robyn Wiegman, *Unmaking: Men and Masculinity in Feminist Theory*, *in* MASCULINITY STUDIES & FEMINIST THEORY: NEW DIRECTIONS 42 (Judith Kegan Gardiner ed., 2002).

214. Maria Baaz, *Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)*, 53 INT'L STUD. Q. 495, 498 (2009).

215. *Id.*

216. *Id.*

217. Eileen Zurbriggen, *Rape, War, and the Socialization of Masculinity: Why Our Refusal to Give Up War Ensures that Rape Cannot be Eradicated*, 34 PSYCHOL. OF WOMEN Q. 538, 538 (2010).

218. For an analysis of the relationship between sexual assault and college football, see Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205 (2008), and, for a discussion of rape in the prison context, see Kendall, *supra* note 207, at 97.

219. A recent news story suggests these rates are connected to overall attitudes within these institutions: a member of one fraternity circulated a survey asking others who they would like to rape. Associated Press, *Vermont: Inquiry Into Allegations of a Rape Survey*, N.Y. TIMES, Dec. 15, 2011, at A22.

220. Thirty-Third Statewide Investigating Grand Jury, Jerry Sandusky Grand Jury Report 6, 7 (2011), *available at* www.washingtonpost.com/wp-srv/sports/documents/sandusky-grand-jury-report11052011.html.

The graduate assistant did not stop the assault, but reported it to the head coach of Penn State's football team, Joe Paterno. Joe Paterno then reported the incident to his supervisor, Tim Curley, who failed to investigate the matter or report the incident to any branch of law enforcement or child protection (in possible violation of a mandatory reporting statute).[221] Tim Curley and two other university administrators were charged with perjury for allegedly lying during their grand jury testimony. Had the report been promptly and properly investigated, Sandusky's access to other children could have been limited.

College football is well known for being a homosocial environment where hegemonic masculinity abounds, and where sexual wrongs frequently happen.[222] Usually, the complainants of sexual wrongs in this context are women.[223] The fact that college football, as an institution, is associated with so many sexual harms suggests that the institution plays a significant role in these occurrences. It plays a role in constructing the hyper-masculinity that is associated with sexual violence, and, in failing to respond effectively when those sexual wrongs happen, it normalizes them.

c. Failing to Address Rape

Sexual assault, as a "form of violence" that treats another human being "as no more than a physical object," not only damages the relationship between the victim and her assailant, but can also damage the relationship between the victim and any third-party institutional actor implicated in the violation.[224] Triangulated tort actions address both of these relationships. Institutions, by their response or lack thereof to sexual assault, send messages that people receive and believe. For instance, a woman raped at Virginia Tech never returned to school there because she felt that their inaction following her complaint "signaled" to her, "as well as to the student body as a whole, that the school either did not believe her or did not view [the assaulter's] conduct as improper."[225]

The relationship between the institution and the plaintiff is important, and connects to the plaintiff's sense of selfhood. Selves are relational: the self is "constituted in an ongoing, dynamic way by the relationships through which each person interacts with others."[226] Relationships with others—from intimate familial and romantic relationships, to less intimate relationships with employers and teachers, to the "social structural relationships, such as gender, economic relations, and forms of governmental power," and relationships with other

221. *Id.* at 12.

222. Scales, *supra* note 218, at 208.

223. *See generally id.*

224. Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, The Unwritten Law, and Narratives of Criminal Responsibility*, 33 L. & SOC'Y REV. 393, 396 n.5 (1999) (quoting DENNIS WRONG, POWER: ITS FORMS, BASES, AND USES (1979)).

225. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 624 (2009).

226. NEDELSKY, *supra* note 89, at 21.

institutional and corporate entities—all help "human beings become who they are."[227] As Marx famously explained, it is through "certain relations" that individuals gain their social (and economic) identities.[228] Within this schema, "law, including rights, is one of the chief mechanisms (both rhetorical and institutional) for shaping the relationships that foster or undermine values such as autonomy."[229]

Through the mechanism of a third-party civil lawsuit, the plaintiff is able to demand accountability from the entity for contributing to the harm she has suffered, or failing to adequately address her complaint. The triangulated civil action is a form of resistance to the violation of her sense of self. It is a form of *self*-defense, specifically of the sexually autonomous self, in the face of the sexual violation.[230] Moreover, it is a challenge to the structural factors that contributed to that violation.[231]

Through triangulated civil claims, female plaintiffs are able to implicate corporations, institutions, and other societal entities for their role in facilitating sexual and gendered harms. In this sense, these actions push back against the strict individualism of liberalism, and argue for a more complicated system of dynamics. In these new triangulations, women use private law for a public purpose: they show that the wrong is not solely private; the wrongs must be contextualized within the systems that give rise to them. Tort law is about "the normative relations" between members of society: "what they owe one another by way of care and how the failure to provide to others the care owed them affects the normative relations between them."[232] Corporations and institutions are a part of society's fabric, and how they treat women and sexual assault complainants affects society as a whole. Rights are relational, and should be viewed not just "in terms of the bipolar relationships of litigants but also more broadly in terms of the social context in which they arise and are given form and substance."[233] These claims help bring those dynamics into focus.

One of the side effects of keeping rape almost solely within the confines of the criminal law is that institutions have been hesitant to address sexual assault. They seem to believe that they are ill-equipped to prevent or deal with such wrongs, and that these matters are best left to the criminal system.[234] However, tort liability, or the risk of tort liability, can make this a more costly decision, and may prompt institutions to become more aggressive in their responses to rape. Further, it is likely that the deterrent effect of tort liability will result in

227. *Id.* at 4.

228. Rubin, *supra* note 35, at 87

229. NEDELSKY, *supra* note 89, at 4.

230. For a more literal take on the role of self-defense in rape, see Henderson, *supra* note 80.

231. *See generally* WOHL, *supra* note 37 (discussing gender dynamics in Greek tragedy).

232. Jules Coleman, *Mistakes, Misunderstandings, and Misalignments*, 121 YALE L.J. ONLINE 541, 551 n.19 (2012).

233. Randall, *supra* note 104, at 485.

234. *See* Scales, *supra* note 218, at 231; Carroll, *supra* note 148, at 21.

increased preventative measures.[235] Corporations and institutions "undoubtedly have realized that taking reasonable precautions to prevent rape, such as installing sturdy locks on apartment doors, is far less costly than paying a settlement or judgment to a rape victim. In turn, the increased emphasis on prevention of rape inures to the benefit of all women."[236] As the spaces, practices, and policies controlled by corporations and other entities begin to recognize and accommodate women's safety and sexual autonomy, new social norms may develop.

d. Power to Affect Society

The third-party triangulation a female plaintiff initiates opens up the legal dispute to the social context that surrounds it, and widens the frame so we can see rape and sexual assault as more than just a private wrong between two people. In this way, these suits help "bring to light the very differentials of power that structure rape:"[237]

> Tort law has made consciousness about automobile safety the responsibility of car manufacturers. Likewise, consciousness about rape prevention should be the responsibility of all men, and of all our institutions (government, business, workplaces, housing, public transportation and public accommodations, schools, families), and of our law and legal system, our educational systems, health systems and the media. We can spread this responsibility by making all citizens, male and female, legally responsible through tort damages actions for failing to take conscious and reasonable precautions against the clearly foreseeable risk of rape to women and by working as lawyers and judges to take the male biases out of the perspective of tort law.[238]

Triangulated sexual assault claims, when taken as a whole, can function like a litigation network,[239] and change the aspects of third-party entities that enable sexual assault.[240] Tort liability can have "an empowering effect on the societal level: it helps break unfair social structures, and reduces power imbalances that

235. *See, e.g.*, Andrew Popper, *In Defense of Deterrence*, 75 ALBANY L. REV. 181, 199 (2012) (explaining that tort liability for corporate misconduct results in deterrence).

236. Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 104, 109 (1981).

237. Henderson, *supra* note 80, at 239.

238. Bender & Lawrence, *supra* note 84, at 325–26.

239. *See* Byron G. Stier, *Crimtorts, Class Actions, and the Emerging Mass Tort Method*, 17 WIDENER L.J. 893, 924 (2008) (describing how mass litigation can function like a network).

240. *But see* Michal Buchhandler, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. OF GENDER & L. 147, 179 (2011) (noting that "a growing body of literature challenges the value of legal tools in producing social change, suggesting that the law provides a mechanism that is deeply limited in successfully fostering social change").

decrease individuals' opportunities to control their own lives."[241] Often, such changes come from "a pioneering and growing utilization of existing law," much like these triangulated claims.[242]

3. Individual Defendant Responsibility

Triangulated civil claims also target social norms at a more micro-level, on the plane of the individual defendant. In keeping with the fact that most sexual assaults are committed by people the victim knows, "a large number of these tort cases stem from date or acquaintance rape," a circumstance that has proven very challenging for the criminal law.[243] Within the civil litigation context, individual defendants may be deterred from non-consensual sex through learning more about their victims' experiences. For example, in the infamous Kobe Bryant case, he issued a public apology shortly after the criminal sexual assault charges were dismissed, but while the civil suit was pending. After apologizing "directly to the young woman involved in this incident" for his "behavior that night and for the consequences she has suffered in the past year," he stated:

> Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.[244]

While obviously not every case will achieve such a result, there is a potential for the civil process to facilitate communications that educate and change a defendant's view of what a consensual sexual encounter looks like. It appears that in many triangulated claims, the plaintiff and the individual defendant reach a settlement through discussion and negotiation, often early in the case.[245] It is difficult to draw conclusions from this fact, but it does mean that the conversation would generally take a different form than the typical "he said, she said" so often associated with the criminal sexual assault trial, and could instead lead defendants to more nuanced understandings of consent in the sexual context.

4. The Role of the State

Tort law is not only about the obligations that those existing in society owe to one another. It is also about "political morality, the obligations of the state to

241. Perry, *supra* note 128, at 966.

242. *Id.* at 967.

243. Bublick, *Tort Suits*, *supra* note 2, at 66.

244. Andrew E. Taslitz, *Wilfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 384 (2005).

245. Bublick, *Tort Suits*, *supra* note 2, at 70.

its citizens, and the limits of citizens' claims on the coercive power of the state."[246] Specifically, it is about the harmed person's "right to have the state's assistance in holding a wrongdoer accountable, or responsible, for what he did."[247] Courts, as agents of the state, consider themselves politically obligated "to empower the plaintiff to act in some manner against the defendant," and they fulfill this obligation by allowing the plaintiff to, under certain legal circumstances, "exact damages or have the defendant enjoined against performing certain acts."[248] Empowering plaintiffs to bring actions against those that wrong them is "part of the state's treating individuals with respect and respecting their equality with others."[249]

The empowerment that the state provides in the tort context is particularly important when contrasted with the disempowerment that complainants experience in the criminal context of rape. The state, after all, is gendered. It exists within a specific gender system, and has an interest and role in perpetuating that system.[250] In this way, it is structurally constrained, and "unlikely to create laws or policies that transcend or fundamentally challenge existing gender relations."[251] But, as part of the social contract, it is obligated to provide some means by which a wrong as egregious as sexual assault can be remedied. According to social contract theory, "people agree to enter into a civilized legal society with the understanding that, though they are giving the state a monopoly on violence, there are adequate systems in place as a substitute for remedying wrongs."[252] The criminal justice system has failed to provide adequate redress for many victims of sexual assault, and "[i]f a state fails to punish enough offenders, at least if their offences are relatively serious, many people think it has breached a duty that it owes the victim or to its citizens more generally. Some even believe that it may have violated their human rights."[253]

However, in the civil action, the state offers an avenue of redress that

246. Jason Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1808 (2007).

247. John Goldberg & Benjamin Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 983 (2010).

248. *Id.* at 974.

249. *Id.* Beyond the state's moral obligation to provide redress, some form of redress may be legally required under the 14th Amendment's Due Process Clause. *See generally* John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE. L.J. 524 (2005) (arguing for recognition of a right, grounded in the Fourteenth Amendment's Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them).

250. Marshall, *supra* note 73, at 105.

251. *Id.*

252. Solomon, *supra* note 246, at 1794.

253. VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 85 (2011). Indeed, the state arguably can become a source of persecution, "either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct." Sarhan v. Holder, 658 F.3d 649, 657 (7th Cir. 2011) (quoting Hor v. Gonzalez, 400 F.3d 482, 485 (7th Cir. 2005)).

mitigates against its failing on the criminal front. Federal, state, and municipal agencies have recently suggested that rape survivors should consider using civil recourse.[254] In fact, the United States Department of Justice now "distributes a publication that 'encourages victim consideration of civil remedies.'"[255] Through the private system of tort law, the state offers one way of fulfilling the social contract and provides a legal substitute for private vengeance for sexual wrongs.

Perhaps unintentionally, the state-sanctioned civil adjudication of rape actually "embodies and furthers several related liberal-democratic values," in ways that may support the feminist project more broadly.[256] First, in "multiple ways, it affirms the significance of the individual citizen," the female plaintiff, seeking redress for the wrong that has been done to her.[257] It offers a means of protecting her interests by imposing a duty on individual and institutional defendants to neither commit nor facilitate sexual assault.[258] Further:

> It enables individuals to assert claims as a matter of right without first obtaining the permission or blessing of government officials. It renders wrongdoers specifically answerable to victims rather than to a government prosecutor acting on behalf of the state or the people. In holding individuals accountable based on what they have done, irrespective (in principle) of who they are, it embodies and reinforces a notion of democratic equality – the idea that there is not a class or group of persons who are somehow entitled to mistreat another, "lower" class or group.[259]

Women have traditionally occupied the status of a lower class or group, and the prevalence of rape and sexual assault suggests that some vestiges of the previous patriarchal order still exist. Through private tort law, the state empowers women to demand equal status in society. Moreover, the price of that kind of empowerment comes at a much lower cost than the price of protection through the criminal law. Reliance on the institutional protection of the state in either a civil or criminal proceeding has a "dual price" to the victim: the price of dependence upon that institution and the price of "agreement to abide by the protector's rules."[260] Any resort to the court system requires dependence upon the institution of the state, but in the criminal context, the victim must also accede to the prosecutor's decision to initiate criminal proceedings. In the civil context, the only rules that the victim must abide by are civil procedure rules and

254. Lininger, *supra* note 11, at 1603.
255. *Id.*
256. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 247, at 981.
257. *Id.*
258. *Id.*
259. *Id.* at 981–82.
260. Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 8 (1992).

tort law generally, and the victim need only depend upon the institution of the state to permit her participation.

V.
OBSTACLES FOR CIVIL TRIANGULATION

Assigning part of the responsibility for sexual harms to the third parties that facilitate or fail to prevent rape is a promising way to eventually enlist them in the project of gender equality. As they become compelled, through tort liability and deterrence, to create safer spaces and hostile-free environments, gender equality will likely increase. There are, however, some obstacles that could impede the development of this area of law. Cultural and legal pressures continue to push women into the criminal justice system as the sole means of redress. These pressures include the use of summary judgment as a means of dismissing these cases prior to jury involvement, persistent rape myths in comparative fault doctrines, gendered ideas of revenge, the connection between credibility and commodification, and general access to justice issues. Each of these issues must be overcome in order for triangulated civil claims to have their transformative effect.

A. Summary Judgment Bars

The doctrines that govern third-party liability for sexual harm have not been firmly established. It is difficult to pull out any clear principles from the case law, as many of the findings and holdings have been contradictory.[261] Usually, the rules of negligence hold that there is "no duty to take reasonable care to protect others from crime."[262] However, if there is a special relationship between the third party and the plaintiff or defendant, or if the third party has increased the danger of a situation, then a third party's general duty of care "may include the duty to take reasonable care to protect others from foreseeable criminal victimization."[263]

As this formulation of the legal question suggests, the issue of intervening criminal acts is now addressed under the heading of duty, rather than proximate cause.[264] The past general rule was that intervening criminal conduct broke the chain of causation, but currently courts are "far less likely to rely on proximate cause and to rule that the sexual assault or other criminal act severs the causal chain. Instead, the fight is now over duty with no clear direction in the case law."[265] For example, in *Bryson v. Banner Health System*, the Supreme Court of

261. Chamallas, *supra* note 6, at 1373.

262. Ellen Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1420 (1999) [hereinafter Bublick, *Citizen No-Duty*].

263. *Id.* at 1420–21. Some cases also proceed on a *respondeat superior* basis. *See, e.g.*, Doe v. Sipper, 821 F. Supp. 2d. 384 (2011).

264. Chamallas, *supra* note 6, at 1374.

265. *Id.*

Alaska considered whether an alcohol treatment center had a duty to warn a patient of another patient's propensity for sexual violence when drinking.[266] The treatment center assigned individuals to a group, and encouraged group members to contact each other outside of the group. When one group member was sexually assaulted by another, she brought an action against the treatment center alleging that they had a duty to warn her about her assaulter's history. The Supreme Court affirmed the lower court's view that in those circumstances, there could be such a duty.

However, duty, as a concept, "is an output not an input."[267] It is "a shorthand statement of a conclusion, rather than an aid to analysis in itself."[268] Policy factors are part of the analysis; duty is merely "an expression of the sum total of those considerations of policy which lead the way to say that the particular plaintiff is entitled to protection."[269] Because of this, the question of whether a third party owes a duty to the plaintiff in these triangulated sexual assault cases cuts along political lines.

Where the duty line falls can help or hinder social justice goals.[270] Conservative courts, which tend to be pro-institutional defendant, often apply no-duty rules on summary judgment to "cut off liability before the claims reach the jury."[271] These decisions seem to be motivated by "a policy judgment that institutional defendants should not be held accountable, despite the foreseeability of the attacks. In support of this view, restrictive courts tend to conceptualize the problem as one of 'random crime,' rather than a systemic problem of high rates of rape and sexual assault which disparately affect women and other vulnerable groups."[272] They often frame rape as an "unlikely event that cannot be foreseen unless committed by the same person in exactly the same situation just before."[273]

An example of this can be seen in a recent case of college rape. The complainant was a hearing-impaired freshman. At orientation for her dorm, the resident advisors told the students that the dorm had an "open door" policy, and then, as a group, the students went outside and each chose a large rock to use to prop their doors open. One night, while her door was propped open with the

266. Bryson v. Banner Health System, 89 P.3d 800, 800 (Alaska 2004).

267. PETER GERHART, TORT LAW AND SOCIAL MORALITY xv (2010).

268. Michael Rustad & Thomas Koenig, *Taming the Tort Monster: The American Civil Jury System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 44 (2002) (quoting Dillon v. Legg, 441 P.2d 912 (Cal. 1968), quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53 (3d ed. 1964)).

269. Rustad & Koenig, *supra* note 268, at 42–43 (quoting RESTATEMENT (SECOND) OF TORTS § 314 (1965)).

270. Michael Rustad and Thomas Koenig note that "[c]ourts will modify duties of care to achieve social justice," but courts will also modify it in ways that achieve other ends. Rustad & Koenig, *supra* note 268, at 45.

271. Chamallas, *supra* note 6, at 1354.

272. *Id.* at 1379.

273. Bublick, *Tort Suits*, *supra* note 2, at 85.

rock, the complainant alleged she was sexually attacked by two men who were unfamiliar to her, but who were wearing the school sweatshirt, which led her to believe they were students at the school. The court dismissed on summary judgment, holding that since most of the previous sexual assaults on campus were acquaintance rape, there was no breach of duty.[274]

Liberal courts, on the other hand, generally tend to endorse pro-plaintiff tort law.[275] Such courts have framed rape as "a foreseeable fact of modern life,"[276] and therefore often find a potential duty and allow the case to proceed to the jury, leaving the jury "to decide whether the defendants acted reasonably under the circumstances."[277]

The Restatement (Third) of Torts warns against dismissing cases at this early stage in the judicial process and suggests that the proper decision point for these cases is in the jury room.[278] It argues that "determinations of no breach" at the summary judgment stage wrongly pretermits jury consideration.[279] The Restatement's caution "is designed to discourage courts from granting and upholding summary judgments simply by indicating that the attack in question was unforeseeable."[280] The warning "'requires judges to recognize and acknowledge that they are deciding a matter ordinarily left to the jury' and thus 'imposes an appropriate psychological hurdle for a judge before so ruling.'"[281] The purpose of this warning is to "encourage judicial restraint and transparency and to underscore that judicial rulings on duty constitute 'an incursion on the role of the jury as fact-finder and as the repository of common sense normative wisdom in individual cases.'"[282]

Although it warns against disposing of the case on summary judgment, the Restatement leaves some space for courts to prevent these triangulated civil claims from going to the jury.[283] For instance, courts can make rulings that "the specific precautions taken by defendants were adequate as a matter of law (i.e. no breach of duty) or for lack of causation. Additionally, courts are authorized to

274. Lees v. Carthage Coll., No. 10–C–86, 2011 WL 3844115, at *5–7 (E.D. Wis. Aug. 29, 2011).

275. *See* Stephen Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 455 (1999) (discussing the turnabout in the California Supreme Court after liberal Democrats were generally replaced with moderate or conservative Republicans).

276. Bublick, *Tort Suits*, *supra* note 2, at 85.

277. Chamallas, *supra* note 6, at 1354.

278. For a critique of the Restatement (Third)'s position on what Professor Robert Rabin termed "enabling torts," see John C.P. Goldberg & Benjamin Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligence Enabling*, 44 WAKE FOREST L. REV. 1211 (2009).

279. Chamallas, *supra* note 6, at 1380.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

make a policy exception from the duty to exercise reasonable care in 'exceptional cases.'"[284]

Part of the problem with disposing of triangulated civil claims on summary judgment is that these kinds of cases involve "culturally polarized understandings of fact."[285] These cases involve a group traditionally vulnerable to sexual assault, and concern questions about the "level of protection required by law when vulnerable groups are disproportionately exposed to injuries and risk."[286] Women, as members of a group particularly vulnerable to sexual assault, and men, who are less likely to be victims of sexual assault, can have very different cultural understandings of factual scenarios involving sexual assault.[287] In such cases, the diversity of viewpoints provided by a jury may be necessary to provide a balanced analysis of the facts at issue.[288]

B. Persistent Rape Myths

In addition to summary judgment concerns, rape myths pose a problem for triangulated civil claims. Rape myths have greatly affected criminal prosecutions for sexual assault, and they unfortunately also play a role in civil litigation. Indeed, some academics have questioned whether the gender biases that have infected criminal rape law will thwart the civil law as well.[289] However, the lower burden of proof in the civil context, and the lower stakes of civil litigation (compensation versus incarceration) may help blunt the effect of these myths. In the criminal context, the complaining witness must have enough credibility to meet the "beyond a reasonable doubt" standard, and if the jury finds such credibility, the accused will likely be imprisoned. In the civil context, though, the complainant only needs to meet the "balance of probabilities" standard: "the victim's story needs to be only slightly more credible than the aggressor's to prevail."[290] Moreover, the consequences of finding a plaintiff more credible than a defendant are not as severe in the civil court, as it will lead to compensation, not incarceration.

1. Comparative Fault Rules

A common trope in criminal rape prosecutions is that the female victim somehow brought rape upon herself through her actions and behavior. Female

284. *Id.*

285. *Id.* at 1398.

286. *Id.* at 1372.

287. *Id.* ("Getting to the jury in such cases increases the chances that 'someone like them' will have a role in decision making and that diverse perspectives in controversial contexts will not be excluded.").

288. For an analysis of the relationship between gender and summary judgment in the federal courts, see Elizabeth Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007).

289. Godden, *Claims in Torts for Rape*, *supra* note 119, at 180–81.

290. Perry, *supra* note 128, at 988.

plaintiffs in triangulated civil claims may have to respond to a similar accusation. Third-party defendants may use the doctrine of comparative fault, which focuses on the complainant's actions and behavior, to argue that the female complainant's actions were "a legal cause of her rape."[291] This is a privilege unique to the third party; in a two-party case, defendants are generally not able, as a matter of law, to assert such a claim against the plaintiff.[292] In triangulated civil claims, however, the comparative fault doctrine has forced courts to consider issues like "whether a rape victim who sues a hotel for negligently failing to provide reasonable security should have her damages reduced because of her own 'unreasonable' failure to protect herself against the risk of rape."[293] These kinds of inquiries take a distinctive form in the sexual assault cases, as courts demonstrate "a greater willingness to scrutinize the victim's behavior than in non-sexual criminal assault cases."[294] In this way, comparative fault defenses mimic the focus on the victim that is prevalent in criminal prosecutions of rape.[295]

Arguing against comparative fault in this context, Ellen Bublick has persuasively advocated for a "no-duty" rule to apply in these cases. Bublick argues that comparative fault defenses in the sexual assault context should be prohibited on the basis of a citizen entitlement (akin to a right): "a citizen should be entitled to shape her life around the assumption that others will not intentionally rape her."[296] She should not have to offer her liberty in exchange for the protection of tort law.[297] Rather, this liberty should be part of what third-party liability protects.[298] So far, this approach has been mentioned favorably in the Restatement (Third) of Torts, and a no-duty rule has been adopted in cases involving sexual harms to children.[299] Given the persuasiveness of Bublick's argument and the recommendations of the Restatement (Third), comparative fault may in the future become more circumscribed.

2. Gendered Notions of Revenge

There are differing cultural expectations surrounding men, women, and the appropriate legal (or extra-legal) redress for sexual harms. Men have historically

291. Bublick, *Citizen No-Duty*, *supra* note 262, at 1415 (citing as examples Wassell v. Adams, 865 F.2d 849, 852, 856 (7th Cir. 1989) and Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 71 (La. Ct. App. 1989)).

292. Bublick, *Citizen No-Duty*, *supra* note 262, at 1415 ("While most jurisdictions do not allow rapists themselves to raise rape victim comparative fault defenses (though a very small and possibly growing minority of jurisdictions may), these same jurisdictions allow negligent third parties like hotels and landlords to raise virtually unlimited defenses of rape victim 'fault.'").

293. Chamallas, *supra* note 6, at 1355.

294. *Id.*

295. Bublick, *Citizen No-Duty*, *supra* note 262, at 1433–44.

296. *Id.* at 1416.

297. *Id.*

298. *Id.*

299. Chamallas, *supra* note 6, at 1385.

had the right, and indeed almost the obligation, "to avenge sexual humiliation."[300] In the prototypical situation, a man was humiliated when another man had sex with his wife: "one's woman in the arms of another man" has been "the ultimate nightmare."[301] While law was meant to channel private vengeful action into legal order, many ancient legal regimes allowed a husband to avenge adultery through violence, usually "by killing his wife and her lover, especially if he caught them in the act."[302] Although some later legal codes discouraged this kind of private action, in many times and places, including many American states in the nineteenth century, there was an 'unwritten law' that a man could kill his wife's lover, even if the law technically prohibited it.[303]

This 'unwritten law' was justified on two bases. First, in states where adultery was not criminalized, a cuckolded man's only legal recourse was in the civil courts, and, according to the argument, the harm done was so grievous that it was beyond price: the "jingling of the guinea" could not assuage the "hurt that honor feels."[304] Second, reliance on the law was itself seen as emasculating. Men who killed their wives' lovers argued that such action was almost an obligatory part of being a man, and that "a man who turned to the law" to respond to such a humiliation was "unmanly and effeminate."[305] Instead of following the laws of the land, "men's actions were governed by a 'higher law' that allowed, even required, vengeance in spite of its formal legal prohibition as intentional murder."[306] According to this argument, men were justified in seeking vengeance on their own, rather than agreeing to be subject to laws that would either allow them to seek civil remedy, or try to pursue prosecutions (in states where adultery was criminalized).

Historical cultural expectations of women were nearly the opposite. Under this set of beliefs, "the reluctance to hurt" was "the mark of the good woman."[307] When their husbands committed adultery, women were expected to accept this as simply part of marriage, and to seek neither legal nor extra-legal remedy. Similarly, women who experienced sexual assault and forced sex were expected to not pursue matters themselves, but to rely exclusively on the criminal law as the sole means of redress, leaving the ability to seek vengeance in the hands of the prosecutor.

Nineteenth-century American jurisprudence discouraged victims from

300. Umphrey, *supra* note 224, at 404.

301. GILLIGAN, *supra* note 41, at 53.

302. LINDA HIRSHMAN & JANE LARSON, HARD BARGAINS: THE POLITICS OF SEX 33 (1998).

303. Umphrey, *supra* note 224, at 406.

304. *Id.* (quoting Thomas J. Kernan, *The Jurisprudence of Lawlessness*, 29 A.B.A. REP. 450, 459 (1906)).

305. Umphrey, *supra* note 224, at 407 (quoting Robert W. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. SOC. HIST. 27, 30 (1989)).

306. Umphrey, *supra* note 224, at 407.

307. GILLIGAN, *supra* note 41, at 193.

pursuing private law remedies arising from acts that crossed the crime/tort divide.[308] Punishment, rather than compensation, was the preferred cultural answer to these kinds of wrongs. The belief was that a woman's civic duty required her to pursue public law remedies before she could turn to private law. Legal doctrines, like the merger doctrine that required the filing of a criminal complaint as a prerequisite to seeking private law remedies, embodied this belief.[309] Through this framing of her obligations, the law subordinated women's private interests to the public interest, resulting in victims having little control over the legal consequences of the sexual harm they experienced.[310] Any desire for revenge or vindication was to be sublimated to the criminal law.

Making a civil claim often involves an element of revenge or desire for vindication.[311] Harmed plaintiffs want to right a perceived wrong and want the law to rebalance the scales in a way that expressively indicates that the defendants must make recompense or amends, to restore some sort of equality between the two parties.[312] The act of bringing a legal claim is a refusal to accept the wrong that has been done; it is a "retaliation against" those that perpetrate harms.[313]

Female plaintiffs who have employed private law as a means of redress have historically faced difficulties. For example, in the late nineteenth century, once women were able to bring suits for the tort of seduction, those that did faced arguments that they were initiating these suits as an inappropriate form of revenge. Another argument was that the torts represented public wrongs, and that private law actions in tort were therefore inappropriate to address them.[314] Indeed, in the 1920s, many of the stereotypical figures seen in current rape myths emerged: the golddigger, the seductress, and the blackmailing woman "appeared in academic debate as well as popular culture."[315]

As is implied in these stereotypes, in addition to arguments rooted in allegations of inappropriate revenge, female plaintiffs also faced objections to monetizing sexual harms. During the 1930s, as more and more female plaintiffs began to bring seduction actions and similar claims, detractors argued that placing a money value on a sexual injury was inappropriate, and that "compensation for reputation and emotional distress commercialized couples' engagements and provided undue incentives for its exploitation by scheming women."[316] Others argued that money was an inappropriate remedy because it

308. VanderVelde, *supra* note 45, at 847.

309. *Id.* at 847–48.

310. *Id.*

311. Adjin-Tettey, *supra* note 77, at 9.

312. Sherwin, *supra* note 46, at 1389.

313. *Id.*

314. Murray, *supra* note 58, at 12, 14–15.

315. HIRSHMAN & LARSON, *supra* note 302, at 165.

316. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 136 (2005) (noting that this was in essence a "hostile worlds" argument (i.e. that intimacy and sex should be kept separate from the

was not a strong enough deterrent for wealthy defendants.[317] Still others asserted that money was an inappropriate remedy for seduction, because "money damages for the loss of a young woman's virtue veered uncomfortably close to prostitution."[318] The stereotypes of vindictive women and the arguments regarding monetizing sexual harms were effective, and "once affection ceased to be conceptualized as a commodity belonging to men, legislatures passed anti-heartbalm statutes that eliminated the [heartbalm] torts altogether."[319] As of 2003, thirty-nine states had abolished the tort of seduction and related torts.[320]

The history of these mostly-dead torts suggests that torts that originally protected a male proprietary interest in female sexuality, and then were repurposed to protect women's interests in their own sexuality, will have to overcome a number of negative stereotypes and commodification arguments. Indeed, arguments and pressures based in stereotypes of vindictive women and commodification still surround rape law.

3. Credibility versus Commodification

To be a successful avenue of recourse for sexual harms, civil claims must overcome two connected myths. The first is the myth that women lie about rape. The second is that seeking compensation for sexual assault commodifies sex. The persistent and pervasive myth that women lie about rape has been deeply embedded in the culture for hundreds of years. Indeed, well into the 1970s,[321] many judges used to read Matthew Hale's infamous seventeenth-century statement aloud to the jury: 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."[322] Unfortunately, this idea still has traction even in the current era.[323] For instance, United States rape crisis centers recently reported that in 17 states, adult rape complainants were required to undergo a polygraph before charges

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world of money)).

317. Murray, *supra* note 58, at 15.

318. *Id.*

319. Rachel Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 748 (2000).

320. ZELIZER, *supra* note 316, at 136.

321. Antony E. Simpson, *The "Blackmail Myth" and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation of a Legal Tradition*, 77 J. CRIM. L. & CRIMINOLOGY 101, 108 (1986).

322. Phillip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 128 (2006). Interestingly, though Matthew Hale was unwilling to find men guilty of rape based on "accusations easily made," he used accusations to sentence women accused of witchcraft to their deaths. Melinda Mawson, *Whores, Witches and the Lore: Rape and Witchcraft, Legal and Literary Intersections*, 12 AUSTL. FEMINIST L.J. 41, 43 (1999).

323. For instance, an article published in 2000 argues that "the belief that women lie about rape is no more than a 'Bayesian' conclusion based on empirical evidence, and is not a product of sexism." Gruber, *supra* note 12, at 598 (referring to Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 948–49 (2000)).

would be issued, and in 11 states, children were required to do the same.[324]

Despite the demonstrated reality that rape is actually very difficult to prove criminally, and the conviction rate for it is very low, this rape myth has enjoyed remarkable persistence, and "[t]he cultural trope of the woman who lies about rape is seen everywhere from the Bible to great works of American literature."[325] This "deep-rooted skepticism about the credibility of female accusers" continues to affect women complaining of sexual assault.[326]

The "false accuser" becomes even more salient when the accused seeks compensation for her injuries. Women who are raped or sexually assaulted experience a spectrum of physical, social, emotional, and financial harms.[327] A victim's health, "housing, schooling, privacy, employment, immigration status, and basic long-term financial welfare" can all be negatively affected.[328] Victims can expect hospital bills, therapy bills, lost tuition, and lost wages to create added expenses resulting from the assault.[329] Further, they will often experience "physical injury, mental health consequences such as depression, anxiety, low self-esteem, and suicide attempts, and other health consequences such as gastrointestinal disorders, substance abuse, sexually transmitted diseases, and gynecological or pregnancy complications. These consequences can lead to hospitalization, disability, or death."[330] In fact, the United States Department of Justice has estimated that these kinds of out-of-pocket expenses add up to approximately $7.5 billion per year, and when the estimated loss of quality of life and pain and suffering associated with sexual assaults are added to that figure, it jumps to $127 billion.[331] In fact, "rape is second only to arson in terms of the cost per victimization."[332] Some estimates place the societal cost of each rape at $1.3 million.[333] Even with the recent increase in civil litigation, "very few victims ever recoup those losses."[334]

Despite the costs associated with sexual assault, the criminal justice system and the general culture view attempts to recoup these losses as suspicious. This

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324. Koss, *supra* note 165, at 211.

325. Orenstein, *supra* note 130, at 1587.

326. Larson, *supra* note 16, at 447.

327. Catherine A. Carroll, *Addressing the Civil Legal Needs of Sexual-Assault Victims*, 58 WASH. ST. B. NEWS 21, 21 (2004) (noting that one incident of sexual assault can destabilize a woman's long-term financial welfare).

328. *Id.*

329. *Id.*

330. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2010).

331. Koss, *supra* note 165, at 215.

332. Matsudaira & Owens, *supra* note 100, at 2.

333. *Id.*

334. Carroll, *supra* note 327, at 22. The increase in civil litigation still represents a very small percentage of sexual assault harms: it is estimated that "fewer than 10 percent of rape survivors file civil claims." Lininger, *supra* note 11, at 1615.

suspicion reflects a cultural tension between commodification and sex. Commodification and sex have long been a point of contention in culture, as reflected in the ongoing debates surrounding prostitution.[335] Whenever sex and money get too close, the specter of prostitution appears, and prostitution is culturally associated with being "unrapeable" and not credible. The connection between prostitution and credibility can occur even in modern courts, where many "admit evidence of prostitution as a crime bearing on credibility."[336] Seeking civil compensation for sexual assault exposes the rape victim to a similar attack on her credibility.

Equating compensation for sexual assault with commodifying sex is premised on a belief that before compensation is sought, sexual assault has little connection to money.[337] However, as the cost of victimization shows, sexual assault has an inherent economic aspect that exists whether the case is litigated or not. Implying that plaintiffs make sexual assault an economic issue is based upon a very narrow view that ignores the already-existing economic consequences of the wrong. Further, when one recalls that historically, there was little cultural difficulty with allowing men to blatantly commodify women's sexuality in lawsuits, the gendered nature of this bias becomes apparent.

In the criminal justice system, an evidentiary rule that allows women to be impeached because they have also brought a civil suit reinforces the idea that credibility and commodification are incompatible. Complainants are taught that there is a credibility-commodification trade-off, and if they want to be believed in the criminal court, they must not try to seek monetary compensation.[338] They are told that "'forswearing any interest in civil damages is the price they must pay to establish their own credibility' as accusers in criminal prosecutions."[339] If they do pursue financial compensation, they will be cross-examined on it, and defense attorneys will use this information to show that they have corrupt motives and are lying in order to extract money from an unwitting man.[340] The complainants will face "scathing impeachment . . . based on their parallel civil

335. *See* MARGARET RADIN, CONTESTED COMMODITIES 132–36 (1996).

336. Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1860 (2008). *See also* Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1405–06, 1410 (2007) (stating that in the 1920s, some courts refused to admit evidence of prostitution for the purpose of bearing on credibility, but by the 1970s, an increasing number of courts had adopted this practice).

337. This type of belief can be seen in *United States v. Morrison*, 529 U.S. 598 (2000). The Court stated, "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 606.

338. Lininger, *supra* note 11, at 1565.

339. *Id.* (quoting Brian Dickerson, *Rape Victims Rarely Sue – Cost Too High*, DETROIT FREE PRESS, May 17, 2000, at 1B.)

340. *See* Mitchell, *supra* note 49, at 129 (quoting California Supreme Court Justice Armand Arabian as saying, "[d]espite the changes [in society], . . . a rape victim still faces the idea that 'she is of corrupt motive' and 'driven by financial gain'").

claims,"[341] and may face questions like "And you sued [the accused] trying to get money through this rape story of yours, haven't you?" and "[Y]ou are going to take [the accused] for all he's worth?"[342] The common stereotype of the "lying, conniving accused—a so-called victim—who plans to use the threat of criminal sanction and publicity to extort a civil settlement from an innocent accused plays right into rape myths," and plays "particularly well when the accused is rich and famous."[343]

Impeaching on the basis of a concurrent civil suit is not common in other types of cases: it would be strange for a person injured in an automobile accident to be impeached in a criminal suit on the basis of a concurrent civil suit.[344] Nevertheless, almost all of the courts that have considered the question of whether a civil suit bears on the credibility of the woman alleging rape have held that it does.[345] Some courts have gone so far as to argue that the mere potential for a tort claim can be a basis of impeachment.[346] In America, there is, in general, "a widespread suspicion against plaintiffs and plaintiff lawyers," and "[i]n sexual assault cases, the suspicion bias is likely to be reinforced through powerful visceral responses to the plaintiff's case and based on the juror's own prejudices."[347] Impeachment on the basis that the complainant is a plaintiff in a civil case taps into this general suspicion bias, as well as the stereotypes of women lying about rape and commodifying sex.[348]

In a recent article, Tom Lininger exposes the gender bias behind this evidentiary rule and offers a compelling alternative framework to govern the admissibility of evidence regarding civil suits in criminal sexual assault trials.[349] It is hoped that such efforts will eventually render the criminal system less hostile to concurrent civil claims for the women who are able to access both systems.[350]

C. Access to Justice Issues

A significant obstacle to triangulated tort claims is the difficulty of accessing civil legal services.[351] Traditionally, little assistance has been

341. Lininger, *supra* note 11, at 1560.

342. *Id.* at 1594.

343. Orenstein, *supra* note 130, at 1604.

344. Lininger, *supra* note 11, at 1562.

345. *Id.* at 1591.

346. *Id.* at 1596.

347. William Friedlander & Alexandra Rudolph, *The Bias Beneath: Uncovering Juror Bias in Sexual Assault Cases*, PLAINTIFF MAGAZINE, June 2010, at 2.

348. Lininger, *supra* note 11, at 1550, 1585.

349. *Id.*

350. *Id.* at 1638.

351. *See* Bublick, *Tort Suits*, *supra* note 2, at 77 ("Perhaps the largest practical hurdle to direct litigation by the victim against the attacker is access to legal services.").

available to women initiating civil claims for sexual assault.[352] Federal rules often prohibit legal aid programs from offering services in tort actions, and the Legal Assistance to Victim grants are similarly encumbered.[353]

Indeed, accessing civil justice in the United States is problematic in general.[354] According to a World Justice Project report, the United States was second to last on a ranking of access to civil justice in high-income countries.[355] However, since triangulated claims usually involve a solvent third-party entity, prospective plaintiffs may actually have a relatively good chance of finding an attorney willing to pursue the matter on a contingency-fee basis.[356] Although factors like the degree of injury and the particular circumstances of the sexual harm may cause attorneys to be more inclined to take on certain types of clients over others, the presence of a "deep pocket" suggests that these cases will remain a viable option for some attorneys.[357] Ultimately, though, more low or no-cost options and services are needed in order to ensure that harmed women who want to bring these claims can do so.

VI.
CONCLUSION

The triangulated legal forms of sexual assault have evolved from the historical homosocial construction of rape as a wrong between two men based on the violation of one's proprietary interest in a woman, through the criminal triangulation of state versus man in pursuit of the public interest, and to a triangulation in which a harmed woman brings a civil suit on her own behalf, against the direct perpetrator of the harm and the third-party entity that contributed to its occurrence. Each of these triangulations has been deeply connected to the societies in which they developed, and each allows us to see the shifting parties and interests protected. The historical triangulation, for example, reflected a standard mode of patriarchal functioning. As society evolved, the state took over the role of the patriarch, and until the 1970s, the criminal system was virtually the sole place of rape redress. In the last forty years, as the feminist movement pushed for gender equality, female plaintiffs have begun to bring tort claims for sexual harms, against both the individual perpetrators and relevant third-party entities.

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352. Lois Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 254 (2005).

353. Bublick, *Tort Suits*, *supra* note 2, at 77.

354. MARK DAVID AGRAST, JUAN CARLOS BOTERO, & ALEJANDRO PONCE, THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 103 (2011).

355. *Id.*

356. Bublick, *Tort Suits*, *supra* note 2, at 77.

357. *See generally* Elizabeth Kuniholm, *Representing the Victim of Sexual Assault and Abuse: Special Considerations and Issues*, *in* ATLA ANNUAL CONFERENCE REFERENCE MATERIALS 1889, 1889 (2006), *available at* 2 Ann.2006 ATLA-CLE 1889 (Westlaw) (discussing the type of planning required for attorneys before taking on triangulated civil sexual assault claims).

By initiating triangulated civil claims against the perpetrators of sexual harm and the third parties that facilitate or fail to prevent rape, harmed women can achieve both private and public purposes. Because triangulated civil claims serve these dual purposes, they can function like crimtorts, and advance the private goals of compensation and acknowledgment while also creating social and systemic change. Through these claims, harmed women assert their individual dignity, and undergo a process of subjectivization that challenges the objectification inherent in the sexual harm and in the prior forms of legal redress for that harm. Further, by implicating the role of a third party in the occurrence of that harm, these claims expose the broader context in which such acts occur. They also help to regulate the important role that third-party entities play in the construction of the self, and in the gender system more broadly.

Tort liability for creating spaces and atmospheres conducive to sexual assault acts as a deterrent that may spur organizational change. Changes in policies and procedures will likely influence social norms, and make sexual harms less normalized. As a result, these third party claims may be able to effect widespread change. However, gendered notions of revenge, evidentiary rules of impeachment in the criminal context, comparative fault doctrines, summary judgment dismissals, and access to justice issues threaten to stifle the development of these claims. Fortunately, the growing body of persuasive scholarship confronting some of these hurdles, the continuing push towards gender equality, and the broadening sense of social responsibility in general suggest that these triangulated claims may not only endure, but may become more culturally accepted as an appropriate means of redress. As this process occurs, there will be less reliance on the criminal system as the exclusive arbiter of sexual harms, a move which will advance the project of disentangling feminism from the politics of the war on crime.