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IS IT WRONG TO SUE FOR RAPE?

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ABSTRACT

The title of this Article poses a rhetorical question. Of course it is not improper to sue a rapist. The act of rape qualifies as a tort in all fifty states. Rape causes egregious injuries, both physical and psychological. The Supreme Court regards rape as the ultimate violation of personal autonomy. Other than homicide, no act is more plainly tortious.

Yet the criminal justice system is surprisingly hostile to civil suits by rape survivors. Judges in criminal cases virtually always allow impeachment of accusers with evidence of civil suits against the alleged assailants or third parties. This Article surveys every published decision on the subject since the 1970s, and it notes judges' general agreement that civil litigation "corrupts" accusers in prosecutions for rape. The courts' aversion to civil litigation reflects a misapprehension of the theoretical principles underlying the impeachment rules; it also reflects assumptions that injuries caused by rape are not remediable in tort.

Although civil suits are sometimes a legitimate ground for impeachment, accusers should not automatically forfeit their credibility in criminal cases simply because they file tort claims.

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Indeed, given the different standards of proof in criminal and civil proceedings, the alleged victim's failure *to file a tort claim may be more noteworthy than her filing of a claim. Impeachment of accusers based on parallel civil litigation actually says more about the wealth of the accused (a highly prejudicial topic) than about the mendacity of the accusers.*

Reforms are necessary to harmonize criminal and civil litigation. The rules of evidence should require a more precise showing of relevance before permitting impeachment of accusers based on their civil claims. Pattern instructions should guide jurors in weighing this evidence. New tolling provisions for civil statutes of limitation can help to reduce the friction between the criminal and civil justice systems. The goal is to ensure that the criminal and civil justice systems are complementary, not mutually exclusive.

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INTRODUCTION

The last few years have seen a tremendous increase in lawsuits alleging rape or sexual assault.[1] Not only has the number of plaintiffs grown, but claimants are recovering larger awards.[2] In particular, 2007

1. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 58 (2006) (reporting that "the number of civil cases being litigated by sexual assault victims has increased dramatically, perhaps exponentially" as measured by the increase in appellate-level litigation in such cases); Angie Perone, *Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act*, 17 HASTINGS WOMEN'S L.J. 115, 116 (2006) (discussing the increase in state court suits presenting claims of violence against women); Wendy McElroy, *Is 'Duke' Case Headed to Civil Court?*, FOXNEWS.COM, May 16, 2006, http://www.foxnews.com/story/0,2933,195753,00.html (observing that "the practice of using both criminal and civil courts to address the same offense has increased substantially"); *see also* Cathy Maestri & Ben Goad, *Activists Decry Bryant Decision*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 3, 2004, at A1 (discussing the chilling effect of the Kobe Bryant prosecution on the reporting of rape to police, and suggesting that the consequence may be a substitution of civil for criminal cases). The scope of the present article extends to rape, sexual assault, sexual abuse, sexual molestation, and sexual imposition, because all of these acts involve nonconsensual and/or improper sexual contact, because they generally tend to occur in private settings, and because cases involving allegations of such acts tend to put the complainants' credibility at issue to a greater extent than other cases.

2. *See infra* Part I.A.

was a record year for such suits.[3] According to one scholar, the recent success of civil claims for sexual abuse proves the symbiosis of tort law and criminal law.[4]

There are many reasons for this burgeoning civil litigation. Broader insurance coverage, better organization among the plaintiffs' bar, innovative theories of third-party liability, feminist support for civil remedies, the success of civil claimants in high-profile cases—all have played a role in expanding civil litigation by survivors of rape.[5]

One important change in the last decade is the government's endorsement of civil litigation as a remedy for rape victims. At both the federal and local level, agencies are urging survivors of rape to consider civil recourse.[6] These agencies recognize that criminal prosecutions cannot make victims whole. Lawsuits are a vital complement to the criminal justice system because civil litigation offers more options for redress, lower standards of proof, and greater opportunities for survivors to steer their litigation.[7] Even the U.S. Department of Justice—hardly a shill for the plaintiffs' bar—distributes a publication that "encourages victim consideration of civil remedies."[8]

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3. *E.g.*, Laurie Goodstein, *Deal Reported in Abuse Cases in Los Angeles*, N.Y. TIMES, July 15, 2007, at A1 (reporting a record $660 million settlement of more than 500 claims against the Archdiocese of Los Angeles). For more examples, see *infra* Part I.A.

4. Professor Timothy Lytton has just finished an important book for the Harvard University Press. *See* TIMOTHY LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE. An excerpt of the book is available at http://www.hup.harvard.edu/pdf/LYTHOL_excerpt.pdf. In this book, he argues that suits alleging sexual abuse by Catholic priests have demonstrated the proactive "policymaking" function of tort law, a function that is separate from, but interrelated with, the prosecution function. *Id.* at 5–6, pt. 2.

5. For a detailed discussion of the factors that have fostered the recent increase in civil suits for rape, see *infra* Part I.A.

6. *E.g.*, CAL. PENAL CODE § 1016 historical and statutory notes (West 2007) ("The Legislature hereby finds and declares that when possible the criminal justice system should be designed so as to assist the efforts of victims of crime to obtain compensation for their injuries [in civil litigation] . . . ."); Victoria O. Brien, *Civil Legal Remedies for Crime Victims*, OVC BULLETIN (Office for Victims of Crime, U.S. Dep't of Justice, Washington, D.C.), Dec. 1992, at 2–3, *available at* http://library.findlaw.com/1999/Mar/4/126733.html (describing benefits of civil litigation by crime victims); *see also* Office for Victims of Crime, U.S. Dep't of Justice, Links to Victim Assistance & Compensation Programs, by State, http://www.ovc.gov/help/voca_links.htm (last visited Feb. 4, 2008) (providing a directory of agencies in every state that assist crime victims in obtaining compensation).

7. *See infra* Part I.B.

8. Brien, *supra* note 6, at 3.

Yet at the same time that the government promotes civil suits, judges in criminal prosecutions permit scathing impeachment of accusers based on their parallel civil claims.[9] Criminal defense attorneys tell juries that accusers forfeit their credibility when they file civil suits. Recent examples of this tactic are numerous.[10] Trial judges generally indulge such impeachment, and the few that question it are vulnerable to reversal by appellate courts.[11] The judiciary seems

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9. This Article uses the term "accuser" to refer solely to a complainant in a criminal prosecution.

10. *E.g.*, King v. Knowles, No. CIV S-03-1780, 2007 WL 1703679, at *15 (E.D. Cal. June 11, 2007) (addressing a claim by the defendant, in his petition for postconviction relief, that the alleged rape victim and her mother "plotted" to accuse him, perhaps to obtain money); Johnson v. State, 643 S.E.2d 556, 559–60 (Ga. Ct. App. 2007) (reversing a molestation conviction because of ineffective assistance of counsel when the defense attorney failed to investigate the accuser's civil claim and attack the accuser's credibility on this basis); Poynor v. State, 962 So. 2d 68, 75 (Miss. Ct. App. 2007) (addressing a suggestion by the defendant that the accuser's rape allegation "was 'all about money'"); Greene v. State, No. E2005-02769-CCA-R3-PC, 2007 WL 1215022, at *3 (Tenn. Crim. App. Apr. 25, 2007) (noting that the defendant sought postconviction relief because trial counsel did not aggressively pursue the theory, among others, that the victim brought a rape complaint for "financial gain"); State v. Neese, No. M2005-00752-CCA-R3-CD, 2006 WL 3831387, at *5 (Tenn. Crim. App. Dec. 15, 2006) (noting that the accused impeached the mother of the alleged rape victim on the ground that she had filed a civil suit seeking damages); Webb v. State, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007) (describing the defense's argument that "the fact that the complainant hired an attorney and was considering filing a civil suit against him showed that she had a financial motive for claiming that the [defendant] sexually assaulted her"); Hoover v. State, No. 03-05-00641-CR, 2007 WL 619500, at *3 (Tex. App. Feb. 27, 2007) (mem.) (in a rape case, describing the defendant's attempt to impeach the accuser with evidence that she "sought financial gain as a consequence of the incident"); State v. Wilson, No. 57236-9-I, 2007 WL 2085333, at *2–3 (Wash. Ct. App. July 23, 2007) (noting that, in a rape prosecution, defense counsel wanted to present evidence that the accuser had sued the housing authority for failing to maintain adequate security to undermine her credibility); *see also* Dennis Tatz, *Ex-Soccer Coach's Trial Set to Start in Teen Rape Case*, PATRIOT LEDGER (Quincy, Mass.), June 21, 2007, at 13 (reporting, in a rape prosecution, that defense counsel intended to cross-examine the accuser's family about her civil suit).

11. *See, e.g.*, United States v. Gutierrez, No. SA-05-CR-639-XR, 2007 WL 3026609, at *7–8 (W.D. Tex. Oct. 16, 2007) (reversing a rape conviction because of the prosecution's failure to disclose certain documents which prevented the defense from discovering that the accuser had bragged that she would sue the city); *Johnson*, 643 S.E.2d at 559–60 (granting a new trial because of ineffective assistance of counsel when the defense attorney failed to cross-examine the victims and their families concerning their civil suit against the defendant's church); State v. Bowens, 871 So. 2d 1178, 1186 (La. Ct. App. 2004) (reversing a rape conviction because the trial court barred the defendant from questioning the accuser about whether she had hired a civil attorney); Commonwealth v. Baran, Nos. 1804251, 181001, 2006 WL 2560317, at *27 (Mass. Super. Ct. June 16, 2006) (mem.) (vacating a rape conviction because of several problems at trial including a failure to cross-examine the accused about her civil suit); People v. McFarley, 818 N.Y.S.2d 379, 380 (App. Div. 2006) (mem.) (reversing a rape conviction because the trial court did not allow defense cross-examination of the accuser regarding her intention to file a civil suit); People v. Stein, 781 N.Y.S.2d 654, 655–56 (App. Div. 2004) (reversing a rape

more suspicious of rape suits than of suits seeking damages for other crimes.[12] While lawsuits by victims of automobile accidents can proceed without objection alongside criminal prosecutions for the same conduct, rape suits bespeak corrupt motives that undermine criminal prosecutions.[13]

The time has come to revise the rules of impeachment of accusers who file parallel civil suits. The evidence codes need a provision that specifically addresses this impeachment. Such a provision would be analogous to existing rules governing evidence of prior sexual history,[14] prior convictions,[15] religious affiliation,[16]

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conviction because the defendant was not allowed to impeach the accuser with evidence that she had served her employer with notice of a tort claim); State v. Vanek, No. 2002-L-130, 2003 WL 22994979, at *4–5 (Ohio Ct. App. Dec. 22, 2003) (reversing a conviction for sexual imposition because the defendant was not allowed to cross-examine the complainant about her parallel civil claim); Commonwealth v. Hanford, 937 A.2d 1094, 1098–99 (Pa. Super. Ct. 2007) (reversing a rape conviction because the trial court denied the defense's request to introduce the accuser's civil complaint); Ramirez v. State, 96 S.W.3d 386, 392, 395, 397 (Tex. App. 2002) (reversing a police officer's conviction for sexual misconduct because the state did not disclose to the defense that the victim planned to sue the city and the defendant).

12. *See infra* Part I.D.

13. Lawsuits seeking compensation for injuries from automobile accidents are the most common type of civil litigation today. Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1068 (2006). Perhaps because this litigation is more familiar, and because the injuries from car crashes may be easier to quantify (medical bills, lost wages during hospitalization, etc.), courts are more comfortable with civil litigation from car accidents. There are far more published opinions insisting on the right to impeach civil claimants in rape prosecutions than in prosecutions for reckless driving. *Compare* State v. Creel, 508 So. 2d 859, 862 (La. Ct. App. 1987) (determining, in a rape prosecution, that the defense's impeachment of the accuser based on her civil action was necessary under a state statute allowing cross-examination regarding "bias, interest, or corruption"), *and infra* Part II.B (collecting opinions requiring impeachment of the accuser in a rape case on the ground that she filed parallel civil claims), *with* State v. Salazar, 707 P.2d 951, 954 (Ariz. Ct. App. 1985) (upholding a conviction for manslaughter in a two-car collision when the trial court did not allow the accused to impeach the prosecution's witness about her pending wrongful death suit), *and* People v. Martinez, 458 N.E.2d 104, 108 (Ill. App. Ct. 1983) (in a prosecution for leaving the scene of a car accident and causing injury, upholding the trial court's decision to prevent the accused from questioning the prosecution's witness about her civil claim), *and* State v. Sampson, 79 N.W.2d 210, 212–13 (Iowa 1956) (in a prosecution for intoxicated driving, holding that the trial court did not unduly prejudice the accused by excluding evidence that the prosecution's witness had brought a civil suit).

14. FED. R. EVID. 412.

15. FED. R. EVID. 609.

16. FED. R. EVID. 610.

settlement negotiations,[17] and other topics for which parties and judges need guidance about the permissible scope of impeachment.

Why limit impeachment that cites accusers' civil claims? The first reason is the scant relevance of this evidence. Impeachment on the ground of bias requires a demonstration that the interest in question is ulterior—that is, divergent from unimpeachable motives. The extraneous interest must be such that it might skew the witness's story, as opposed to providing additional reasons to tell the same story.[18] In rape cases, judges appear to presume a public, altruistic motive for accusers' testimony in criminal prosecutions, whereas judges posit a selfish motive for plaintiffs' testimony in civil suits.[19] This dichotomy is fallacious. In fact, one may argue that self-interest is the primary motive for complainants in both settings. Complainants in criminal cases may seek personal protection, retribution, and perhaps restitution from defendants or payments from victim compensation funds.[20] Requests for restitution and victim compensation in criminal proceedings are off-limits for impeachment according to well-settled precedent.[21] It is fanciful to suggest that the

17. FED. R. EVID. 408. For more discussion of existing rules that exclude otherwise relevant evidence based on concerns about prejudice and incentives for out-of-court conduct, see *infra* Part IV.A.

18. *See infra* Part III.A.1.

19. *See* Doe v. Shakur, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (suggesting that a plaintiff in a rape suit is seeking to advance her selfish interests, whereas an accuser in a rape prosecution is advancing the public interest); Wooten v. State, 464 So. 2d 640, 642 (Fla. Dist. Ct. App. 1985) (noting that cross-examination about the accuser's civil litigation was necessary to explore whether she was "actuated by personal considerations instead of altruistic interest generated solely from motives in the public interest to bring a criminal to justice" (quoting State v. Doughty, 399 A.2d 1319, 1324 (Me. 1979))); *infra* Part III.A.1.

20. One scholar has observed that in criminal prosecutions "the promise of restitution or victim compensation appears to victims to be identical to personal injury awards." Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 726 (2007) ("In fact, prosecutors usually both present evidence and argue for restitution as if it is a private tort remedy for harm.").

21. *E.g.*, State v. Mercer, 106 P.3d 1283, 1292 (N.M. Ct. App. 2004) (holding that the trial court correctly barred impeachment of the prosecuting witness with evidence that he sought restitution); Hoover v. State, No. 03-05-00641-CR, 2007 WL 619500, at *3 (Tex. App. Feb. 27, 2007) (mem.) (holding, in a rape prosecution, that the trial court properly barred the accused from impeaching the accuser on the ground that she had applied for and received compensation from the Crime Victims' Compensation Board at the Texas attorney general's office, because "[t]he proffered evidence does not show a tendency to lie, and it is only marginally probative on the issue of bias or motive"); State v. Michaels, No. 39339-1-I, 1997 WL 785646, at *3 (Wash. Ct. App. Dec. 22, 1997) (per curiam) (holding that evidence of restitution is irrelevant because it does not show a "financial interest" or "profit motive" on the part of the accuser).

motivation for tort suits is so dissimilar as to be cognizable in impeachment theory.[22]

In any event, an accuser might actually be *more* vulnerable to impeachment if she did not file a parallel civil claim. The standards of proof are much lower in civil court, so her failure to file a civil claim might invite the criticism that she doubts her own allegations.[23] Thus the impeachment value of an accuser's civil suit is dubious, because the evidence could support diametrically opposite conclusions about the accuser's credibility.

The prejudicial effect of this evidence often exceeds its probative value. One problem is that jurors generally distrust accusers in rape prosecutions.[24] In particular, jurors' cognition seems prone to an ulteriority heuristic: confronted with fact patterns in which one or more parties appear to have acted irrationally, jurors too readily accept the explanation that the accuser has lied or exaggerated to serve selfish goals.[25] Evidence of parallel civil litigation inflames jurors' instinctive prejudice[26] in much the same way that evidence of prior sexual history inflames prejudice against accusers. Moreover, evidence of accusers' suits might actually prejudice *defendants*, because this evidence focuses attention on defendants' wealth.[27] Prosecutors might find it necessary to introduce evidence of defendants' poverty, or accusers' wealth, to prevent the inference that

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22. *See infra* Part III.A.1. In addition to so-called "selfish motives," complainants in both civil and criminal actions share a number of other purposes that might fall under the rubric "public." For example, the civil complainant may want to spare future victims from assault by the same defendant or help change the community's mores concerning permissible behavior in sexual relationships. Civil complainants' motive to seek retribution may deserve classification as "public," in that retribution expresses society's collective outrage as well as vindicates the accuser. *See infra* Part III.A.1.

23. *Cf.* State v. Sexsmith, 57 P.2d 1249, 1251 (Wash. 1936) (recounting that, during a larceny prosecution, the "appellant offered to prove that the witness had consulted different lawyers with the view of starting a civil action against the appellant based upon the transaction which is the subject-matter of this [criminal case], and that no such suit was ever brought").

24. *See infra* notes 254–61 and accompanying text.

25. *See infra* notes 257–58 and accompanying text.

26. Brian Dickerson, *Rape Victims Rarely Sue—Cost Too High*, DETROIT FREE PRESS, May 17, 2000, at 1B ("Although the public has little difficulty appreciating an ordinary assault victim's desire for restitution, some jurors are more suspicious when a rape victim brings all her legal remedies to bear."); *see also infra* notes 254–56 and accompanying text.

27. *E.g.*, Harkins v. United States, 810 A.2d 895, 898–99 (D.C. App. 2002) ("[D]uring cross examination of the complainant, trial counsel attempted to elicit the complainant's potential financial bias. . . . [C]omplainant was asked whether she knew . . . the [criminal defendant] might be wealthy.").

accusers filed their suits to make money.[28] Such a discussion is surely prejudicial and distracting for the jury.

One further reason to limit cross-examination about accusers' suits is the risk that this impeachment could dissuade rape survivors from pursuing civil remedies. When rape survivors realize that civil claims could reduce prospects for successful prosecution or could subject the complainants to onerous cross-examination by criminal defense attorneys, some survivors may prefer to forego civil litigation altogether.[29] According to one commentator, "many rape victims . . . conclude that forswearing any interest in civil damages is the price they must pay to establish their own credibility" as accusers in criminal prosecutions.[30] The law should not force an election of remedies. Both civil suits and prosecutions further the public interest. Civil suits not only compensate victims but also prompt third-party defendants to take precautionary measures that could prevent future rapes. For example, suits by rape victims have spurred owners of apartment buildings to improve security for all residents, and suits against employers have led to stricter supervision and background checks.[31] The impeachment rules should not subvert the salutary role played by the civil remedial system.

Another deleterious effect of impeachment based on civil claims is the discouragement of rape survivors from cooperating with law enforcement. Indeed, after the well-publicized opprobrium that Kobe Bryant's accuser endured when she filed civil claims during the criminal prosecution, rape survivors across the county may have decided to abandon criminal charges altogether in favor of civil suits.[32] Criminal prosecutions for rape are very difficult without the cooperation of alleged victims.[33] The growing unwillingness of rape

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28. *E.g.*, People v. McLaughlin, 672 N.W.2d 860, 878 (Mich. Ct. App. 2003) (permitting, in a rape prosecution, the prosecutor's questioning about defendant's poverty because "it related to defendant's argument that the victim falsely accused him" to make money in a lawsuit).

29. *See infra* Part III.A.3.

30. Dickerson, *supra* note 26.

31. *See infra* notes 93–98 and accompanying text.

32. Maestri & Goad, *supra* note 1 (arguing that rape victims who saw Kobe Bryant's accuser excoriated for her civil suit might rather file civil claims without bothering with criminal prosecutions).

33. *See, e.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 749–52, 822–24 (2005) (citing survey results indicating an increase of dismissals in prosecutions of violence against women due to heightened confrontation requirements and accusers' reluctance to testify); Kirk Johnson, *The Bryant Trial: Anatomy of a Case that Fell Apart*, N.Y. TIMES, Sept.

survivors to assist with criminal prosecutions will especially benefit rich defendants, who are the most likely targets for civil litigation. The incompatibility of criminal and civil proceedings could create a class-bifurcated system in which rich defendants pay for rape while poor defendants serve time.[34] In effect, the rule allowing impeachment based on civil suits would become a type of double jeopardy clause that protects wealthy defendants from facing both criminal and civil consequences for rape.

To be sure, the Sixth Amendment's Confrontation Clause would not abide a new rule prohibiting impeachment of accusers based on parallel civil suits. The accused has a constitutional right to confront prosecuting witnesses with evidence of their bias.[35] The defendant must have some leeway to develop impeachment theories without the constraint of a per se rule declaring civil suits to be off limits during cross-examination of the accuser. But the Sixth Amendment right to impeach is coextensive with the materiality and probative value of the impeachment evidence.[36] The rules of evidence do not give judges practical guidance in distinguishing relevant from irrelevant impeachment evidence concerning parallel suits, so judges err on the side of overinclusion, exceeding the mandate of the Confrontation Clause.[37] Ironically, the effect is to drive a substantial number of rape cases into the civil remedial system, where the defendants have no constitutional right of confrontation.[38]

This Article proposes several reforms.[39] A new rule of evidence would establish a specific test for the admissibility of impeachment evidence based on accusers' civil claims. This rule would not exclude all such evidence, but it would list criteria that would help judges evaluate admissibility. Other necessary reforms include the adoption of pattern jury instructions, the postponement of filing deadlines for civil claims, and the establishment of new protocols for police who interact with victims of violent crime.

3, 2004, at A14 (reporting a comment by a prosecutor that the accuser's reluctance to continue was the reason for the dismissal of rape charges against Kobe Bryant).

34. *See* Mark Kreidler, *Money May Be the Best Defense*, SACRAMENTO BEE, Oct. 2, 2004, at C1 (citing dismissal of rape charges against Kobe Bryant).

35. *See infra* Part III.B.1.

36. *See infra* Part III.B.1.

37. *See infra* Part II.A.

38. *See infra* Part III.A.4.

39. *See infra* Part IV.

Although this Article focuses on sexual assault, the theoretical and policy questions it addresses do not arise solely in that context. Indeed, this Article proposes reforms that would apply to all categories of prosecutions. Rape cases receive the most attention because they most starkly illustrate the tension between impeachment rights and policy concerns about accusers' interests. If this Article's proposals strike an appropriate balance in rape cases, they likely will make sense in other contexts as well.

The December 2006 amendments to the Federal Rules of Evidence elevated the importance of the topic of impeachment because they exacerbated the asymmetry between impeachment of accusers and defendants with evidence of civil litigation.[40] States have begun to consider whether to adopt or modify the amended language in the Federal Rules.[41] Meanwhile, civil suits for rape have increased,[42] and legislatures have passed laws to encourage such suits.[43] In 2004, the Supreme Court rejuvenated the Confrontation Clause,[44] and lower courts have followed suit by approving liberal impeachment of accusers.[45] The time is ripe for an analysis of confrontation rights and accusers' competing interests in rape prosecutions with parallel civil claims.

This Article proceeds in several steps. Part I examines the growing incompatibility of civil and criminal proceedings. Part II analyzes the present admission of evidence concerning accusers' parallel civil claims. Part III considers arguments favoring reform, as well as constitutional requirements that necessitate some

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40. For a discussion of the 2006 amendments' revisions to FED. R. EVID. 408, see *infra* Part II.A.

41. Changes to the Federal Rules of Evidence do not automatically result in changes to their state counterparts, although many states follow the federal model. *See* GEORGE FISHER, EVIDENCE 3 (2002).

42. *See infra* Part I.A.

43. Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355, 372 (2005) (noting that eleven states and the District of Columbia have created civil rights remedies for rape).

44. *See* Crawford v. Washington, 541 U.S. 36, 53–54 (2004) (requiring confrontation of hearsay declarants who make testimonial statements); *see also* Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006) (refining the definition of what constitutes a testimonial statement in deciding two domestic violence cases).

45. *See, e.g.*, State v. Lewis, 648 S.E.2d 824, 829–30 (N.C. 2007) (granting a new trial when identification of the defendant hinged "almost entirely" on an unavailable witness's prior photo identification, which the court deemed testimonial under *Davis*).

impeachment of accusers. Part IV offers specific proposals, including a new evidence rule.

I. GROWING "COMPETITION" BETWEEN CIVIL SUITS AND PROSECUTIONS

An increasing number of rape cases proceed on two tracks: criminal and civil. Rape survivors find that civil proceedings offer a number of advantages, including greater control, a wider range of remedies, and procedural rules that are less favorable to defendants. Some rape survivors prefer to postpone their filing of civil claims until the conclusion of criminal proceedings, but a large number of survivors pursue civil remedies while prosecutions are pending.

A. Recent Increase in Civil Suits Alleging Sexual Assault

The number of lawsuits seeking damages for sexual assault has swelled since the 1970s. The rate of such litigation increased in the 1980s,[46] the trend accelerated in the 1990s,[47] and the number of

46. Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 105, 109 (1981) (discussing the increase in third-party rape suits); Petula Dvorak, *Fighting for Rape Victims*, L.A. TIMES, Apr. 26, 1992, at J1 (quoting Gail Abarbanel, director of the Santa Monica Rape Treatment Center, who indicated that "[o]ver the last five to 10 years we've seen an increase in civil suits" by rape victims); Saundra Saperstein, *Rape Victims Turn to Lawsuits for Relief*, WASH. POST, July 29, 1985, at A1 (noting the "growing ranks of women nationally who are fighting rape by filing lawsuits"); *see also* JOEL EPSTEIN & STACIA LANGENBHAN, U.S. DEP'T OF JUSTICE, THE CRIMINAL JUSTICE AND COMMUNITY RESPONSE TO RAPE 73 (1994) ("[M]ost experts on rape say that while there were only a few civil suits 15 years ago, women now bring suit because they are less shamed by rape and more aware of the legal options for fighting back.").

47. *See New Directions from the Field: Victims' Rights and Services for the 21st Century*, OVC BULLETIN (Office for Victims of Crime, U.S. Dep't of Justice, Washington, D.C.), Aug. 1998, at 2, *available at* http://www.ojp.usdoj.gov/ovc/new/directions/pdftxt/bulletins/bltn17.pdf ("It is primarily within the last decade that civil litigation has emerged as a meaningful option for crime victims . . . ."); Maureen Balleza, *Many Rape Victims Finding Justice Through Civil Courts*, N.Y. TIMES, Sept. 20, 1991, at A1 (observing that the rate of civil rape litigation was growing from a few suits to a "steady stream"); Eric Frazier, *More Women Sue After a Sexual Assault*, CHARLOTTE OBSERVER, Feb. 21, 1999, at 1B (quoting David Beatty, director of public policy for the National Center for Victims of Crime, as observing a "growing trend" toward civil litigation in rape cases and that "at least 500 sexual assault victims nationwide a year file civil lawsuits against their assailants"); *see also* PROJECT COMM. ON CIVIL REMEDIES FOR SEXUAL ASSAULT, B.C. LAW INST., CIVIL REMEDIES FOR SEXUAL ASSAULT 3 (1999), *available at* http://www.bcli.org/pages/projects/sexual/CivilRemRep.pdf ("Historically, [Canadian] civil actions for damages for sexual assault have been available in theory, but only relatively recently have they been used as a means of obtaining redress.").

lawsuits grew "exponentially" beginning in 2000.[48] This increase is all the more remarkable considering that the frequency of rapes appears to have decreased during the period in which the rate of civil litigation has risen.[49]

Not only has the number of lawsuits increased, but recoveries by plaintiffs have skyrocketed since 2000. For example, lawsuits alleging sexual abuse by Catholic priests yielded record-breaking settlements in the summer of 2007.[50] Settlements of suits arising from sexual assaults on campuses[51] and in apartment buildings[52] have shattered records. Lawsuits alleging sexual abuse by police have also netted huge settlements.[53] Suits against celebrities such as Kobe Bryant and Michael Jackson culminated in confidential settlements that were presumably quite large. One study indicated that the average payout for successful rape lawsuits was $600,000.[54]

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48. Bublick, *supra* note 1, at 58; *see also* Joe McGurk, *Tenant Rape $hock*, N.Y. POST, Feb. 5, 2003, at 3 (discussing the consensus among experts that civil suits alleging rape have risen appreciably in recent years); sources cited *supra* note 1.

49. David A. Fahrenthold, *Statistics Show Drop in U.S. Rape Cases: Many Say Crime Is Still Often Unreported*, WASH. POST, June 19, 2006, at A1 (reporting a decrease in the number of rapes per capita since the 1970s based on data compiled by the U.S. Justice Department). Whether the rate of rapes actually fell, or the number of *reported* rapes fell, is an open question. *Id.*

50. Laurie Goodstein, *Deal Reported in Abuse Cases in Los Angeles*, N.Y. TIMES, July 15, 2007, at A1 (reporting that the $660 million settlement "will be by far the largest payout made by any single diocese since the clergy sexual abuse scandals first became public in Boston in 2002").

51. *E.g.*, Gordon Dillow, *$6.8 Million Settlement Doesn't Say "We're Sorry*," ORANGE COUNTY REG., Aug. 3, 2003, at B1 (noting that a $6.8 million settlement in lawsuit against public school for molestation of fourth graders was the largest sexual abuse settlement paid by a California school district); Nick Perry, *UW Pays $480,000 to Settle Suit Over Sex Abuse*, SEATTLE TIMES, July 16, 2007, at A1 (discussing an assault that took place at a University of Washington hospital psychiatric unit and noting that "UW officials believe it's the highest amount the university has paid to settle any sexual-abuse lawsuit").

52. *E.g.*, McGurk, *supra* note 48, at 3 (reporting an interview with the plaintiff's attorney in a rape suit against the owners of an apartment building in which the attorney indicated that his client's seven-figure settlement was one of the largest ever in a rape lawsuit in New York).

53. *See, e.g.*, Alan Feuer & Jim Dwyer, *City Settles Suit in Louima Torture: Victim Gets $8.75 Million and Cites Police Dept. Changes*, N.Y. TIMES, July 13, 2001, at A1 (indicating that the City of New York and the police union spent $8.75 million to settle a lawsuit filed by a victim whom police had brutally sodomized during interrogation); Peter Sleeth, *Eugene Settles Final Lawsuits in Police Sex Scandal*, OREGONIAN (Portland), June 8, 2006, at A1 (reporting that the City of Eugene, Oregon spent over $5 million settling claims that two police officers had sexually abused female suspects).

54. Jury Verdict Research, a Pennsylvania-based legal consulting firm, reviewed civil rape lawsuits filed during a seven-year period and found that among successful suits, the median recovery was $600,000. Frazier, *supra* note 47.

Many commentators had not expected that rape suits would be so frequent or so successful. These scholars believed that the indigence of most rapists would set a natural boundary for the viability of civil remedies in rape cases.[55] Yet civil litigation continues to grow, in part because plaintiffs' attorneys have widened their focus to include new targets: third-party defendants. Plaintiffs' attorneys are suing not only the alleged rapists but also the landlords, hotel owners, security companies, universities, hospitals, nursing homes, schools, employers, and government agencies that arguably bear some responsibility for the perpetrators' conduct.[56] Third-party defendants often have substantial resources, allowing plaintiffs to recover damages for their injuries even when the alleged rapists themselves are "judgment-proof."[57] The theories of third-party liability for rape have included negligent hiring of perpetrators, failure to maintain safe conditions on the premises at issue, and, in some cases, knowing involvement by supervisors in the sexual abuse.[58]

This Article's empirical study confirms the prevalence of third-party suits based on allegations of sexual assault.[59] Since the 1970s,

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55. *See, e.g.*, John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 699 (2002) (recognizing that perpetrators' lack of assets forecloses tort litigation for victims in many cases); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2204–05 & n.39 (2000) (expressing pessimism about the viability of civil remedies for rape victims in large part due to the indigence of rapists); Perone, *supra* note 1, at 122 (pointing out that a civil remedy "is only useful against an individual perpetrator who has assets to recover"); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 137–38 n.76 (2001) (commenting that many perpetrators of violence against women lack assets and are therefore "judgment-proof").

56. Bublick, *supra* note 1, at 57 (reporting that most of the recent lawsuits for sexual assault name third parties as defendants); Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 258 (2005) (noting that third-party suits are more common than suits that solely name the rapists); Mike Nixon, *Sexual Assault Cases May Include More Third-Party Suits*, ST. LOUIS DAILY REC./ST. LOUIS COUNTIAN, Apr. 24, 2006, http://findarticles.com/p/articles/mi_qn4185/is_20060424/ai_n16225077 (indicating that more claimants are suing third parties for damages resulting from sexual assault).

57. *E.g.*, Wriggins, *supra* note 55, at 138 n.76.

58. *See* Nixon, *supra* note 56 (listing theories for recovery in suits against third parties); Nat'l Crime Victim Bar Ass'n, Case Law, http://www.ncvc.org/vb/main.aspx?dbID=DB_CaseLaw495 (last visited Jan. 25, 2008).

59. In the summer of 2007, I reviewed a database of published opinions in cases in which civil litigation involved allegations of sexual assault. I obtained the cases from a larger database maintained by the National Crime Victim Bar Association ("NCVBA") that includes judicial opinions in cases involving lawsuits by crime victims. NCVBA Home Page, http://www.victimbar.org (last visited Feb. 26, 2008). I included in this study all cases involving claims against either perpetrators, third parties, or both. Some caution is necessary in

there have been at least 2,210 published opinions in cases involving suits for damages arising from sexual assault. A total of 587 opinions addressed civil claims filed solely against alleged perpetrators. A far greater number of cases, 1,633, involved civil claims against third parties.[60] In other words, approximately 74 percent of the published opinions involved third-party claims. The third-party claims alleged conduct that took place in a wide variety of settings: residences (16.2 percent), schools (11.3 percent), apartment buildings (8.1 percent), the workplace (7.2 percent), churches or other houses of worship (5.2 percent), hotels (5.2 percent), parking lots (3.9 percent), hospitals (3.7 percent), jails (2.8 percent), and vehicles (2.4 percent), among others.[61] The number of published cases addressing third-party suits in the last five years exceeds by 2000 percent the number of published cases addressing third-party suits in the early 1980s.

Why have rape suits proliferated over this period? A number of factors appear to be at work. First, a highly specialized group of plaintiffs' lawyers has begun to focus on such litigation.[62] These lawyers disseminate information to prospective clients, and they use the Internet effectively in their marketing. The victims' bar also has begun to share information about litigation strategies, including discovery tactics and theories of liability.[63] Lawyers for rape victims have compiled databases of settlements, and they use this information to maximize recoveries in every case.[64] The ready availability of

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interpreting the findings of this study. First, the study has overemphasized recent cases, because a higher proportion of court opinions—including slip opinions—had become available online in the ten years prior to my study compared to the preceding decade. Second, there may have been a higher proportion of third-party claims among published opinions because the complex issues raise in many cases were more likely to provoke appellate review and because third-party defendants with deep pockets were more likely to raise the sort of sophisticated defenses that warrant published opinions.

60. Some of these cases also involved claims against perpetrators, but third-party defendants appeared to be the primary targets because of their greater resources.

61. By contrast, a much higher proportion of suits against perpetrators alleged conduct that occurred in residences (31.9 percent).

62. *New Directions from the Field*, *supra* note 47, at 2 (observing that civil litigation on behalf of crime victims has emerged as "a specialized area of attorney expertise"); Kanter, *supra* note 56, at 258 (reporting that "a growing number of tort lawyers have become engaged in representing victims of sexual assault").

63. For example, the National Crime Victim Bar Association maintains a web site with training materials for attorneys who wish to represent plaintiffs in bringing civil claims for sexual assault. Nat'l Crime Victim Bar Ass'n, Information for Attorneys, http://www.ncvc.org/vb/main.aspx?dbID=DB_AttInfo123 (last visited Feb. 6, 2008).

64. *E.g.*, Nat'l Crime Victim Bar Ass'n, Case Law, http://www.ncvc.org/vb/main.aspx?dbID=DB_CaseLaw495 (last visited Feb. 6, 2008) ("The database also includes [v]erdict

information and the growing success of the victims' bar have encouraged more rape victims to file tort claims.[65]

Second, victims' advocacy groups have embraced civil remedies.[66] Feminists regard these suits as a means of empowering rape survivors.[67] The Office for Victims of Crime at the U.S. Department of Justice has explicitly encouraged the filing of such suits[68] and has helped to provide training and resources for attorneys representing crime victims in civil actions.[69] A number of other important advocacy groups, including the National Crime Victim Law Institute, have promoted civil suits against rapists and other perpetrators of crime.[70] The commitment of victims' advocates to civil remedies was evident when the Supreme Court considered whether to overturn the federal civil remedy for violence against women in 2000.[71] A total of thirty-six state attorneys general and a large group of feminist organizations filed amicus briefs to save the civil remedy.[72]

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and [s]ettlement information that has been reported by [b]ar [a]ssociation members or published in the news media.").

65. *New Directions from the Field*, *supra* note 47, at 2 ("Historically, information about pursuing civil remedies has not been readily available to crime victims. . . . In response, attorney networks have been established specifically to refer victims of crime . . . .").

66. EPSTEIN & LANGENBHAN, *supra* note 46, at 73 ("The victim service community is also becoming interested in the use of civil suits by rape victims.").

67. Bublick, *supra* note 1, at 62 (suggesting that "increased assertion of tort claims may reflect women's greater economic and political power"); Balleza, *supra* note 47 (noting that prominent victims' advocates such as Susan Estrich favor civil litigation as a remedy for certain rape victims).

68. Brien, *supra* note 6, at 2 ("This publication encourages victim consideration of civil remedies.").

69. *New Directions from the Field*, *supra* note 47, at 2 (discussing extensive training programs funded by the Office for Victims of Crime).

70. For more information about this organization, see generally National Crime Victim Law Institute, http://www.lclark.edu/org/ncvli (last visited Feb. 6, 2008).

71. *See* United States v. Morrison, 529 U.S. 598, 631–34 (2000) (Souter, J., dissenting) (reviewing congressional findings that refer to statistics provided by academics, victims' advocates, and other experts).

72. The statute in question was 42 U.S.C. § 13981(c) (2000), which is a provision of the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). This provision created a civil cause of action in federal court for a victim of violent crime that had been motivated by gender animus. The U.S. Supreme Court struck down the civil remedy in VAWA on the ground that Congress had no authority under either the Commerce Clause or the Fourteenth Amendment to enact this legislation. *Morrison*, 529 U.S. at 627. An impressive coalition of amici filed briefs defending the constitutionality of the challenged provisions. *E.g.*, Brief for the States of Arizona et al. as Amici Curiae in Support of Petitoners' Brief on the Merits at 2–3, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29), 1999 WL 1032809; Motion for Leave to

Third, rape victims are becoming more and more frustrated with the criminal justice system.[73] Criminal trials have become more difficult for accusers in the last few years. The U.S. Supreme Court's new jurisprudence under the Confrontation Clause limits using out-of-court statements instead of victims' live testimony.[74] Courts seem less inclined to protect the privacy of accusers during criminal trials.[75] Higher sentences for rape have compounded survivors' reluctance: some do not want their assailants to go to prison for so long, and some do not want to endure the more difficult cross-examination that occurs at high-stakes trials.[76] As rape victims become more disillusioned with the criminal justice system, they may seek redress in civil proceedings.[77]

Fourth, the greater availability of insurance has created new incentives for civil claims. Recovery is rarely possible under policies held by the rape survivor or the perpetrator due to policy exclusions for intentional torts.[78] Insurance companies have become more aggressive in marketing negligence liability insurance to potential third-party defendants such as landlords, employers, schools, and other institutions.[79] These institutions have begun to purchase this insurance to cover liability for sexual assault cases.[80] When disputes

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File Brief Amici Curiae and Brief Amici Curiae of Equal Rights Advocates et al. in Support of Petitioners at 1–4, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29).

73. Benjamin F. Barrett, Jr., *Bias in Sexual Assault Cases, in* 2 ATLA ANNUAL CONFERENCE REFERENCE MATERIALS 1845, 1845 (2006), *available at* 2 Ann.2006 ATLA-CLE 1845 (Westlaw) ("The majority of sexual assault victims are frustrated by the criminal system; the perpetrator is rarely prosecuted. These victims want the perpetrator to be held accountable, and they can be through civil cases."); Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 472 (2005) (discussing rape victims' disillusionment with criminal justice system).

74. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1354, 1363–66 (2005).

75. *Id.* at 1379–80.

76. *Id.* at 1371–75, 1382–84.

77. For example, an organization that counsels rape victims in Southern California reported that the proportion of victims interested in prosecutions is decreasing, and there are comparative advantages for victims in the civil remedial system. Maestri & Goad, *supra* note 1.

78. Matsuda, *supra* note 55, at 2205 n.39 (noting that insurance policies have generally excluded coverage for intentional acts by the insured).

79. George Williams, *Programs Flourish as Insurers Push Revenue Growth*, AM. AGENT & BROKER, June 1, 2007, at 52 (reporting that insurers are marketing expanded coverage for sexual abuse at nursing homes and social service facilities).

80. *See* Susan Bradshaw, *A HEAD for Insurance . . . A HEART for Nonprofits*, NONPROFIT WORLD, Nov. 11, 2005, at 25 (explaining why nonprofits need this insurance too); Charlie Roduta, *Schools Diversify Insurance Coverage*, COLUMBUS DISPATCH (Ohio), July 10, 2006, at 1A (claiming that schools are increasingly interested in insurance for sex abuse); Ed

arise about coverage, courts have found in favor of claimants.[81] The availability of insurance makes civil litigation more attractive to plaintiffs' attorneys.

B. Advantages and Disadvantages of Civil Suits

The growing popularity of civil litigation is attributable in part to the advantages that it offers over criminal prosecution. The comparative benefits and pitfalls of civil litigation vary depending on the facts of each case, but it is possible to draw some generalizations.

One important distinction is that the victim controls the civil proceeding, but the government controls the criminal proceeding.[82] The victim is not even a party to a criminal prosecution, and the victim cannot choose the prosecuting attorney, select the charges to file, direct the presentation of evidence, or choose between settlement and trial. By contrast, in a civil case, the victim can select the attorney and make important decisions such as whom to sue, what theory of recovery to assert, what evidence to present, and whether to settle.[83]

Civil proceedings offer better prospects for financial compensation than do criminal prosecutions. Victims of rape bear tremendous costs, including medical bills, lost wages, and fees for professional services such as counseling; in some jurisdictions, restitution is not as likely as civil litigation to cover all these costs.[84]

Waters, Jr., *Connie Phillips to Head Statewide Insurance Group*, FREDERICK NEWS-POST (Md.), Dec. 13, 2005, at 13 (reporting that day care centers also buy this insurance).

81. *E.g.*, Rick Hepp, *Judges: Insurer Could Be Liable in Sex Assault by 13-Year-Old*, STAR-LEDGER (Newark, N.J.), Mar. 27, 2007, at 15 (reporting on a judicial ruling that a boarding home's insurance policy could cover sexual assault by a boarder depending on whether the young assailant knew that the victim would be injured or intended to injure her).

82. Brien, *supra* note 6, at 2 ("In the criminal case, the prosecutor makes all the decisions."); Anthony Sebok, *Unusual Claim in Bryant Accuser's Civil Suit*, CNN.COM, Aug. 23, 2004, http://www.cnn.com/2004/LAW/08/23/sebok.bryant/index.html (suggesting that a civil suit allows a rape victim to take control, whereas a criminal prosecution vests all the control with the government).

83. Brien, *supra* note 6, at 2–3 (discussing various ways in which civil litigation gives crime victims greater control).

84. TED R. MILLER ET AL., U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 1 (1996) (taking account of expenses relating to medical and mental health care and noting that "if rape's effect on the victim's quality of life is quantified, the average rape costs $87,000—many times greater than the cost of prison. . . . When pain, suffering, and lost quality of life are quantified, the [aggregate] cost of rape [is] . . . $127 billion"); *see also* Matsuda, *supra* note 55, at 2205 n.39 (noting that restitution and payments from crime victim-compensation boards may not fully cover victims' injuries and losses in all cases).

Not only is financial compensation important for the victim's benefit, but it also imposes an additional punishment on the offender—a sanction that may be particularly important when the offender qualifies for a lighter sentence in the criminal case because the offender lacks a criminal history.[85]

Odds of success are better in civil proceedings than criminal proceedings. Prosecutors bring charges in only a small percentage of rape cases, and an even smaller percentage of these cases end in convictions.[86] The standard of proof in a civil case is much lower than in a criminal case: civil plaintiffs only need to prove their allegations by a preponderance of the evidence, whereas prosecutors must prove guilt beyond a reasonable doubt.[87] Because of the disparate standards of proof, factual evidence that would be insufficient in a criminal prosecution might very well suffice to support a plaintiff's verdict in a civil case.[88]

Civil litigation can reach defendants who might be invulnerable to criminal prosecution. For example, victims can bring suit against defendants who won acquittal in criminal proceedings. Plaintiffs may choose to sue defendants whom the government did not prosecute within the criminal statutes of limitations, but who may still be vulnerable to suit under the civil statutes of limitations.[89] Plaintiffs who sued the Catholic Church for covering up sexual abuse by Catholic priests benefited from longer limitations periods in civil

85. Brien, *supra* note 6, at 12 (explaining that a victim's civil lawsuit "can serve to further punish the perpetrator through the device of punitive damages").

86. David Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1244–52 (1997) (discussing the low rate of charges and convictions in rape cases); Seidman & Vickers, *supra* note 73, at 472 (indicating that "rape is the least reported, least indicted, and least convicted non-property felony in America"); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1024 (1991) (reporting that approximately 1–4 percent of rape arrests end in convictions).

87. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 841 (1993) (pointing out that in civil suits for sexual assault, "the 'reasonable doubt' standard of criminal law need not be met, and recovery can occur under the civil law's more lenient 'preponderance of the evidence' standard").

88. Holly J. Manley, Comment, *Civil Compensation for the Victim of Rape*, 7 T.M. COOLEY L. REV. 193, 199 (1990) (observing that the civil law's lower standard of proof offers a "major advantage" for complainants who are choosing between the civil and criminal justice systems).

89. Many states have established tolling provisions for civil statutes of limitations in cases involving childhood sexual abuse. *See infra* Part IV.B.2.

cases. Because the public discovered the scandal around 2002,[90] decades after much of the abuse occurred, the priests involved generally were immune from prosecution under criminal statutes of limitations.[91] In addition, civil suits provide a means of pursuing third parties who lack the requisite mens rea for criminal liability but who may bear civil liability under a negligence theory.[92]

Civil proceedings can prevent future victimization by prompting third-party defendants to adopt safeguards.[93] Typically, these safeguards involve the improvement of security at apartment buildings, hotels, and school campuses.[94] In the summer of 2007, the Marine Corps settled with two female recruits who claimed that recruiters had raped them; the settlement agreement provided not only for a substantial recovery but also for changes in the recruiting

90. *See* Goodstein, *supra* note 50 (noting that the clergy sexual abuse scandals first became public in Boston in 2002).

91. To quantify this value, in the summer of 2007, I examined a database compiled by the Bishop Accountability Project, a nonprofit group that has collected records of sex abuse claims filed against Catholic priests based on conduct occurring in or after 1940. This database included hundreds of records. The database indicated that convictions occurred in a very small percentage of the sex abuse cases in which victims sought monetary compensation. BishopAccountability.org, http://www.bishop-accountability.org (last visited Feb. 26, 2008).

92. Brien, *supra* note 6, at 2 ("In a civil court, the victim controls essential decisions affecting the case against the perpetrator (the first party) and negligent third parties—parties who do not commit the crime but whose negligence may have facilitated the occurrence of the crime.").

93. EPSTEIN & LANGENBAHN, *supra* note 46, at 74 ("Civil suits have perhaps had their greatest impact by prompting third parties, such as employers and landlords, to take measures that will prevent criminal attacks on those to whom they owe a duty of care."); Kanter, *supra* note 56, at 258 (observing that some civil suits by rape victims can bring about "far-reaching changes that can protect future victims from similar assaults").

94. A report commissioned by the U.S. Department of Justice discussed the value of civil litigation in avoiding future victimization:

> Civil litigation often provides a crime prevention method. When perpetrators, or other negligent parties involved in creating the conditions of victimization, are made to pay for their violent acts or negligence, these acts are often not repeated. For example, when hotels are ordered to pay money damages for their lack of adequate security that causes rapes or assaults to occur, they often respond by improving security to avoid future lawsuits. This is true of many other institutional or third party defendants who have had to pay damages in negligence suits.

JANE N. BURNELY ET AL., U.S. DEP'T OF JUSTICE, NATIONAL VICTIM ASSISTANCE ACADEMY HANDBOOK ch. 8, at 2 (1998); *see also, e.g.*, *The Price of Rape*, TIME, Sept. 6, 1976, at 32, *available at* http://www.time.com/time/magazine/article/0,9171,918307,00.html (indicating that rape lawsuits have prompted defendants to improve security at universities, hotels and apartment buildings, often at considerable expense).

process.[95] In 2006, the New York State Assembly settled a suit alleging rape by a high-level legislative aide, and the settlement agreement created new procedures for the reporting of sexual misconduct in the future.[96] In 2005, a suit alleging a sexual assault on a private college campus led to a court order opening up the college's police logs to public scrutiny, and the lawsuit also provoked a legislative proposal to extend this practice to all private campuses in the state.[97] From 2005 through 2007, lawsuits alleging sexual abuse by Catholic priests led the Church to adopt sweeping reforms to reduce the risk of such abuse in the future.[98]

Procedural requirements in civil trials are less favorable to the defense than in criminal trials. Nonunanimous verdicts are permissible in civil cases.[99] Defendants have no constitutional right to counsel, and accusers may bring their own attorneys to court; in criminal prosecutions, defendants always have attorneys, and accusers generally do not.[100] Defendants in civil cases generally may overcome liability on a theory of insanity.[101] Civil plaintiffs can rely on evidence that is inadmissible in criminal prosecutions, such as police reports

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95. Among other provisions, the settlement agreement required Marine recruiters to post notices providing confidential contact information for recruits who wish to report sexual abuse, and the agreement required the involvement of female Marines at several stages in the recruiting process. Glen Martin, *Marine Corps to Alter Recruiting Practices After Alleged Rapes*, S.F. CHRON., June 8, 2007, at B1.

96. Jennifer Medina, *Assembly Settles Suit on Sexual Misconduct*, N.Y. TIMES, Jan. 28, 2006, at B3 (noting that, according to plaintiff's counsel, the complainant "wanted this for anyone following in her footsteps").

97. Andrea Jones, *Bill Would Make Colleges Release Crime Reports*, ATLANTA J.-CONST., Mar. 18, 2005, at D8 (quoting the plaintiff's counsel, who argued that open records would promote awareness of security problems on campuses and would allow future victims to obtain the police reports for the incidents in which they were involved).

98. One expert suggests that the clergy abuse litigation has provided a "especially powerful example of how tort litigation can enhance policymaking." LYTTON, *supra* note 4, at 10.

99. Kate Marquess, *Juries Hang Up on Close Calls, Study Says: Data Shows That Evidence, Not Diversity, Is the Main Factor*, A.B.A. J. E-REPORT, Oct. 18, 2002, *available at* WL 1 No. 40 ABAJEREP 3 (citing a study by National Center for State Courts indicating that thirty-four states permit nonunanimous in civil cases).

100. Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 700–30 (2007) (noting that victims in rape prosecutions rarely have their own counsel and that prosecutors' objectives do not always align with victims' objectives).

101. Brien, *supra* note 6, at 3 (noting that civil courts do not generally relieve defendants of civil liability by reason of insanity, so rapists who invoke this defense successfully in criminal proceedings could still be liable in civil proceedings).

and other categories of hearsay.[102] Indeed, defendants have no confrontation rights in civil cases. Civil plaintiffs can call defendants as witnesses, and they can more easily introduce evidence of defendants' prior crimes and sexual misconduct.[103] In civil cases, victims have greater latitude to introduce evidence of rape trauma syndrome and post-traumatic stress disorder.[104] The procedural and evidentiary rules in civil trials are far easier for rape survivors to navigate than the rules in criminal trials.

To be sure, civil litigation is problematic on a number of levels. Rape survivors who are indigent may not find civil remedies very useful, both because these survivors lack the resources to hire attorneys and because their assailants typically lack resources as well.[105] Whereas rape survivors may remain anonymous in criminal proceedings, they generally must reveal their identities to file civil claims.[106] Civil suits often take longer to resolve than criminal prosecutions.[107] Most states do not extend rape shield laws to civil cases, so complainants expose themselves to more extensive

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102. *New Directions from the Field*, *supra* note 47, at 2 (indicating that victims of rape and domestic violence find that "[t]he burden of proof is lower in civil cases than in criminal cases, requiring a less rigorous measure of the evidence to establish liability").

103. Under Rule 404(a) of the Federal Rules of Evidence (FRE) and its state analogs, *see, e.g.*, the prosecution may not introduce evidence of the defendant's violent character unless the defendant has somehow opened the door. FED. R. EVID. 404(a). Under FRE 404(b), the prosecution may not cite evidence of the defendant's prior violent acts unless a special exception applies. FED. R. EVID. 404(b). FRE 413 suspends FRE 404 in prosecutions of sexual violence, *see* FED. R. EVID. 413, but virtually no states have adopted analogs to FRE 413. Thus the rules of evidence significantly constrain the prosecution's use of the defendant's prior violent acts, at least in state court where the vast majority of rape cases are prosecuted. Civil cases are not subject to the same constraints. *See* FED. R. EVID. 404(a) (limiting the scope of preclusion to criminal cases); *see also* Brien, *supra* note 6, at 3 (discussing the ease with which civil plaintiffs may introduce evidence of prior similar acts).

104. Brien, *supra* note 6, at 9 (noting that courts are more receptive to this evidence in civil cases than in criminal cases).

105. *See* Perone, *supra* note 1, at 122 ("[T]he assumption that a lawsuit is one of the best solutions for victims of domestic violence and sexual assault is riddled with class bias.").

106. Doe v. Shakur, 164 F.R.D. 359, 362 (S.D.N.Y. 1996) (holding that a plaintiff in a civil action for sexual assault could not proceed under a pseudonym); Doe v. Univ. of R.I., Civ.A. No. 93-0560B, 1993 WL 667341, at *3 (D.R.I. Dec. 28, 1993) (same).

107. EPSTEIN & LANGENBAHN, *supra* note 46, at 73 (observing that civil suits take longer than criminal prosecutions); Brien, *supra* note 6, at 12 ("[C]ivil cases may be in litigation for years before a decision is rendered."). Although defendants have a speedy trial right in criminal cases, this right does not extend to plaintiffs in civil actions. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2000).

questioning about their sexual histories when they file civil claims.[108] Rape survivors may be more vulnerable to discovery in civil cases than in criminal cases. Many states prohibit depositions of crime victims in prosecutions, but these states allow depositions of crime victims who choose to sue the perpetrators.[109] Courts in civil cases might limit the recovery of plaintiffs in rape suits based on notions of comparative fault.[110] These various drawbacks create difficulties for plaintiffs, but a growing number of rape survivors file civil claims nonetheless.

C. Necessity for Simultaneous Civil and Criminal Proceedings

Some plaintiffs may find it advantageous to postpone the commencement of civil suits until after the conclusion of criminal proceedings. Such a strategy might reduce plaintiffs' litigation costs if they can rely on some of the proof adduced by the government, including transcripts of testimony and even the conviction of the accused. When the civil proceeding follows the criminal proceeding, the defendant will not be able to invoke a Fifth Amendment right against self-incrimination when called to testify in the civil proceeding.[111] The doctrine of collateral estoppel may bar defendants in civil cases from denying guilt proven in criminal proceedings (assuming that the elements of the tort claims are coextensive with the elements of the criminal offenses).[112] Many convicted defendants may simply settle rather than face another trial.[113]

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108. EPSTEIN & LANGENBAHN, *supra* note 46, at 73 ("A State's rape shield law applies only in criminal cases. In a civil action, the defense counsel is often free to question the victim about her sexual history."); *see also* Kirk Johnson, *Twist in Bryant Case As Accuser Files Lawsuit*, N.Y. TIMES, Aug. 11, 2004, at A13 (noting that a civil suit by Bryant's accuser would potentially subject her to cross-examination on her prior sexual history that would have been off-limits in the criminal prosecution because Colorado's rape shield law did not apply to civil cases).

109. Some state constitutions prohibit depositions of victims in criminal cases. *E.g.*, ARIZ. CONST. art. 5; IDAHO CONST. art. 1, § 22(8); LA. CONST. art. 1, § 25; OR. CONST. art. 1, § 42(1)(c). Yet these same states allow depositions of civil plaintiffs, including victims of alleged torts which might also qualify as crimes. ARIZ. R. CIV. P. 30; IDAHO R. CIV. P. 30; LA. CODE CIV. P. art. 1437; OR. R. CIV. P. 39.

110. *Cf.* Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1416 (1999) (proposing that no court should be able to reduce the damage award for a rape survivor based on her "comparative fault").

111. Bublick, *supra* note 1, at 69.

112. One commentator has observed that the majority position in the United States finds collateral estoppel in these circumstances:

> Under the modern view, a criminal conviction precludes the defendant from denying his guilt in a subsequent civil suit. In federal court it is clear that a prior

Yet there are several reasons why simultaneous criminal and civil proceedings may be necessary for rape victims to vindicate their rights. To begin with, statutes of limitation for intentional torts often require that plaintiffs file their claims within one or two years of the incident in question.[114] Plaintiffs seeking punitive damages may need to file more quickly than plaintiffs who simply seek compensatory damages.[115] Some states have tolling provisions that apply if victims are minors or if victims discover the extent of their injuries at a later time.[116] But for the most part, victims have no choice but to file their civil claims before the standard statute of limitations. Criminal prosecutions often drag on for more than a year, especially when the defendants waive their speedy trial rights.[117] A defendant who wishes to obtain discovery through parallel proceedings, or who wishes to impeach the accuser with evidence of civil litigation, may try to postpone the criminal proceedings long enough to force the victim's hand in the civil proceedings. Sometimes the postponement of criminal trials occurs not because of gamesmanship, but because of the need for DNA testing, the need to locate material witnesses, the need for psychological evaluation of the defendant or complainant, or other circumstances. Thus the statutes of limitation for civil claims may make it impossible to try criminal and civil matters in succession.[118]

> federal conviction can be used to collaterally estop the relitigation of the issues in a subsequent civil suit. Most states now follow this approach. The rationale purported to support this approach would arguably be the same as that given to support the doctrine of collateral estoppel in general—namely judicial economy and the finality of litigation.

Ray B. Schlegel, Case Note, Zinger v. Terrell*: The Collateral Estoppel Effect of Criminal Judgments in Subsequent Civil Litigation; New Law in Arkansas and the Questions Unanswered*, 54 ARK. L. REV. 127, 138 (2001).

113. Brien, *supra* note 6, at 4 (observing that after a conviction in a criminal case, a defendant may simply capitulate in the subsequent civil case).

114. *See infra* Part IV.B.2.

115. *See, e.g.*, Sebok, *supra* note 82 (noting that Kobe Bryant's accuser faced a two-year statute of limitations for a civil claim asserting sexual assault, but the statute of limitations was one year if she intended to seek punitive damages).

116. For a state-by-state analysis of tolling provisions, see *infra* notes 394–96. Sometimes plaintiffs in child abuse cases can file suits long after the incidents in question if the complaints allege delayed discovery of the abuse or its effects. Many lawsuits alleging molestation by priests were filed after the limitations period for criminal charges had run. *See supra* note 91.

117. A rape prosecution can take two or more years to move from indictment to trial, excluding preindictment investigation. Seidman & Vickers, *supra* note 73, at 472 n.26.

118. Brien, *supra* note 6, at 4 ("[E]arly filing of a civil action may cause the criminal defense attorney to attempt to undermine the victim's credibility as a witness in the criminal case. . . .

Even if victims have the option of successive trials, they might prefer simultaneous proceedings to avoid the loss of evidence. Witnesses may move, die, or become forgetful. Physical evidence may be misplaced, or the need for such evidence may not be apparent until shortly before the civil trial, when retrieval is no longer possible. Records of businesses, landlords, employers may be destroyed at routine intervals, and so they may no longer be available if civil trials lag too far behind criminal trials. Some unscrupulous record keepers, fearing the prospect of third-party liability, may cover up evidence to prevent plaintiffs from using it against them later in civil suits.[119] Plaintiffs cannot necessarily depend on criminal investigations to meet all the needs of the civil litigation, especially if plaintiffs intend to bring claims against third parties. Finally, rape survivors who bear conspicuous signs of injury shortly after being attacked may wish to try the civil case while their injuries are still visible to present a more compelling spectacle to the jury. If civil juries see injuries long after rapes, they might award lower damages for pain and suffering, whereas juries might award more generous damages shortly after rapes because of uncertain timetables for victims' recovery.

Victims might want to hasten civil litigation for their own peace of mind. They want to put the entire ordeal behind them. A civil trial necessitates a very difficult public recitation of what was probably one of the most traumatic incidents in the plaintiff's life.[120] Rape survivors may not want to experience such an ordeal two times over a prolonged period.[121] Closure is difficult for a survivor to achieve while either a criminal or civil proceeding is pending. Simultaneous proceedings would allow the rape survivor to move on as quickly as possible.

A rape survivor who foresees the need for a trial in a civil suit may prefer that the civil trial precede the criminal trial. Jury verdicts

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[T]oo long a delay could very well jeopardize the victim's right to file a civil suit . . . "); Sebok, *supra* note 82 (considering the dilemma faced by Kobe Bryant's accuser, who needed to file a civil claim before the conclusion of the criminal prosecution, and arguing that "it is not fair to ask the alleged victim to wait . . . . [because] if she waits, her claim might end up being barred by the statute of limitations.").

119. *Cf.* Pokorak, *supra* note 20, at 716–17 (noting that potential third-party defendants may produce "favorable reports as soon as possible to" nip their civil liability in the bud).

120. Kanter, *supra* note 56, at 259–60 (indicating that rape victims find both criminal and civil litigation to be exhausting and stressful).

121. *See* Brien, *supra* note 6, at 12 (noting that the plaintiff in a civil case "may have to repeat details pertaining to the victimization, . . . with the resulting psychological stress").

in civil cases may be higher if the criminal prosecution has not already won a significant sentence. Although the Double Jeopardy Clause does not protect a sentenced defendant from a private civil suit, after a severe sentence, the civil jury may reduce its monetary damages award out of sympathy.

One important consideration is the possibility that the prosecution might result in acquittal. A complainant whose proof is foreseeably inadequate to establish guilt beyond a reasonable doubt, but whose proof may be sufficient to show a preponderance of the evidence in a civil trial, might want to proceed solely in civil court for fear that an acquittal might weaken the civil case. The acquittal would not provide a basis for collateral estoppel because of the different standards of proof, but some authority suggests that acquittals in criminal prosecutions may be admissible in subsequent civil suits alleging the same acts.[122]

Rape survivors may want to press forward quickly with civil litigation to ensure that third-party defendants take precautionary measures as soon as possible. For example, a victim of rape in an apartment building may want the property manager to improve security as quickly as possible. A parent whose child suffered sexual abuse in the neighborhood school may want to conclude civil litigation against the school district quickly to force reforms at the school to reduce the risk of future abuse.

For all the foregoing reasons, rape survivors may be impatient to file civil claims. They may insist on simultaneous civil and criminal proceedings, even though such proceedings create more complications than successive actions.

D. Prosecutors' and Judges' Hostility to Civil Claims by Accusers

Prosecutors dread the filing of civil claims by rape victims. Rape prosecutions depend heavily on the credibility of accusers.[123] Civil

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122. See Anthony J. Bocchino & David A. Sonenschein, Practice Commentaries—Federal Rules of Evidence 36 (2d ed. 2003) (construing Rule 413 of the Federal Rules of Evidence to conclude that acquittals in prosecutions of alleged sex crimes are admissible in later civil suits alleging same facts); Jennifer B. Siverts, Note, Punishing Thoughts Too Close to Reality: A New Solution to Protect Children from Pedophiles, 27 T. Jefferson L. Rev. 393, 399 (2005) (same). But see Schlegel, supra note 112, at 138 (suggesting that acquittals should not be admissible in later civil suits, because acquittals lack relevance because of the different standards of proof).

123. State v. Bowens, 871 So. 2d 1178, 1186 (La. Ct. App. 2004) (opining that the importance of the alleged victim's credibility in rape prosecution heightens the need for evidence concerning parallel civil action); Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J.

litigation exposes accusers to extensive cross-examination and may inflame juries' instinctive prejudice against "greedy" complainants. Given courts' general approval of such cross-examination, and jurors' enmity toward accusers who sue,[124] parallel civil litigation reduces the likelihood that prosecutors will obtain convictions.[125] Thus many prosecutors regard victim suits as "bad news."[126] Prosecutors grow frustrated when civil tort litigation "interferes" with criminal prosecutions based on the same facts.[127] Some prosecutors try to dissuade victims from seeking civil remedies until after criminal proceedings have ended.[128] Prosecutors regard the success of the criminal action as the paramount goal, and they explicitly subordinate victims' interest in remediation.[129]

Prosecutors resent procedural nuisances that arise when accusers file tort claims. One headache is that prosecutors must constantly be mindful of their ethical duty not to use (or allow accusers to use) criminal proceedings to achieve tactical advantages in parallel civil proceedings.[130] Another source of grief is prosecutors' duty under

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441, 457 (2005) (arguing that the accuser's credibility is crucial in prosecutions of both acquaintance rape and stranger rape); *see also* Pokorak, *supra* note 20, at 700 ("Undoubtedly, one of the most difficult classes of cases prosecutors must handle is a sexual assault case.").

124. For a more thorough discussion of jurors' biases against rape suits, see *infra* Part III.A.2. Any scholar who analyzes the judicial system's prejudice against complainants in rape cases must pay tribute to the pathbreaking work of Susan Estrich, who is arguably the nation's foremost authority on the subject. *See generally* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (analyzing courts' insensitivity to rape victims).

125. Johnson, *supra* note 108 ("Legal experts said that the [accuser's] lawsuit, and the new wrinkles it creates for the prosecution, could effectively end the criminal case . . . .").

126. *See* Jonna M. Spilbor, *Why Prosecutors Should Dismiss Bryant Case*, CNN.COM, Aug. 18, 2004, http://www.cnn.com/2004/LAW/08/18/spilbor.bryant/index.html ("For the prosecution, the filing of the civil suit is more bad news.").

127. *See* Webb v. State, No. 03-04-0004-CR, 2005 WL 1842740, at *7 (Tex. App. Aug. 4, 2005) (mem.) (recounting that a prosecutor of rape worried that parallel civil litigation could "interfere" with prosecution).

128. For example, in a recent case in Texas, the prosecutor of a rape case received a phone call from the accuser's civil attorney before the criminal trial. Webb v. State, 232 S.W.3d 109, 111 (Tex. Crim. App. 2007). "The attorney mentioned the possibility of filing a suit against Appellant, but the prosecutor asked that the suit not be filed because it would interfere with the criminal trial. Accordingly, complainant's attorney said he would wait to file the civil suit until after Appellant's trial." *Id.*; *see also* State v. Ahmed, No. 84220, 2005 WL 1406282, at *12 (Ohio Ct. App. June 16, 2005) (dismissing the defendant's argument that the prosecutor pressured the accuser to drop her civil claim against the defendant).

129. Pokorak, *supra* note 20, at 698 (discussing how prosecutors subjugate the interests of rape survivors).

130. *See* State v. Forbes, 918 S.W.2d 431, 439 (Tenn. Crim. App. 1995) (noting an ethics rule that prohibits using criminal proceedings to facilitate settlement of civil proceedings).

Brady v. Maryland[131] to keep track of all exculpatory evidence, including inconsistent statements by witnesses; that task becomes harder when prosecutors do not solely control all investigation and trial preparation.[132] During criminal trials, prosecutors' mischaracterization of parallel proceedings can create reversible error.[133] Yet another concern is defendants' wider opportunities for discovery in civil cases: Defendants can use more liberal discovery rules in civil cases to preview, and perhaps shape, the testimony that the government will offer at trial.[134] Further, prosecutors worry that civil settlements may co-opt accusers.[135] Victims who file civil claims generally have their own attorneys, so prosecutors find that they must go through intermediaries to interact with their star witnesses. Prosecutors and plaintiffs' counsel may disagree about trial strategy; prosecutors particularly prefer to have victims testify for the first time in the criminal trial. In sum, the overlap of criminal and civil litigation may create a trilateral adversarial contest in which the government, the accused, and the accuser all have distinct interests.[136]

Prosecutors sometimes take drastic action to avoid the perceived harm of parallel civil and criminal proceedings. In some instances, prosecutors may dismiss the criminal charges altogether once accusers have filed or settled civil claims.[137] Or prosecutors may move for

131. Brady v. Maryland, 373 U.S. 83 (1963).

132. People v. Wahl, No. 2-94-0635 (Ill. App. Ct. 1996) (Westlaw), *reported in part in* 674 N.E.2d 454 (noting, in a rape prosecution, that the defendant "assert[ed] the State had a duty to provide him with discovery concerning the civil lawsuit" filed by the accuser).

133. *See, e.g.*, Ramirez v. State, 96 S.W.3d 386, 395 (Tex. App. 2002) (reversing a police officer's conviction for sexual misconduct because the prosecutor presented evidence at trial that mischaracterized the accuser's pending civil action against the city of Austin).

134. *E.g.*, Doe v. Lyons, No. Civ. A. 96-0341, 1996 WL 751531, at *1 (Mass. Super. Ct. Dec. 23, 1996) (denying the district attorney's motion to quash defendants' discovery requests in a parallel civil suit alleging sexual assault); Johnson, *supra* note 108 (speculating that "if both the civil and criminal cases are proceeding at the same time, Mr. Bryant's lawyers could perhaps use the civil suit, with its looser rules of evidence, to find information that might damage [the accuser's] credibility in the criminal case").

135. William H.J. Hubbard, Note, *Civil Settlement During Rape Prosecutions*, 66 U. CHI. L. REV. 1231, 1231–33 (1999) (expressing concern that accusers who settle civil claims while prosecutions are pending will cease to cooperate with prosecutors).

136. Lininger, *supra* note 74, at 1394–96.

137. For example, the prosecutor in the Kobe Bryant case dismissed the criminal charges after the accuser filed a civil suit. *See* Sebok, *supra* note 82 (indicating that Kobe Bryant's accuser filed her civil claims shortly before the criminal trial due to time pressure imposed by Colorado's statute of limitation for civil cases); *CNN Saturday Morning News* (CNN television broadcast, Oct. 2, 2004), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0410/

orders staying parallel civil claims until after the conclusion of criminal proceedings.[138] In these motions, prosecutors argue that criminal and civil proceedings are incompatible and that the public interest requires the precedence of the criminal litigation.[139]

On a fundamental level, prosecutors may believe that victims' filing of civil claims amounts to a vote of no confidence in the prosecution.[140] According to this logic, victims who seek civil remedies have lost faith in the efficacy of the prosecution to redress the wrongs at issue in the case. It is as if victims who file civil claims are no longer willing to play subordinate roles to prosecutors in criminal cases, and they believe that they can do a better job seeking redress alone.

Judges, for their part, seem to harbor some antipathy for rape lawsuits. One explanation is that judges generally distrust complainants in rape cases. Some judges feel greater empathy for the alleged rapists than for the complainants, and these judges go to extraordinary lengths to complicate the task of proving rape.[141] In July 2007, one Nebraska judge barred witnesses, including the complainant, from using the words "rape," "victim," "assailant" and "sexual assault kit" in a trial for rape; instead, he required the witnesses to use more innocuous words such as "sex" and "intercourse."[142] A substantial number of judges seem to suspect the

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02/smn.01.html). Lida Rodriguez-Taseff, a civil rights attorney, argued that the dismissal of criminal charges in the Bryant case was "sour grapes by the prosecutor." *Id.*

138. Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 208 (1990) (explaining why prosecutors would seek to stay civil proceedings).

139. *Id.*

140. *See* Spilbor, *supra* note 126 (describing Kobe Bryant's accuser's lawsuit as a "vote of 'no confidence' in [the] prosecution").

141. SUSAN ESTRICH, REAL RAPE 55–56 (1987) (explaining that judges create additional hurdles for complainants because of the "nightmare" that a man would be falsely accused of rape); Bryden & Lengnick, *supra* note 86, at 1327 (observing that "the rape literature is peppered with anecdotes about male judges who were crudely biased in favor of acquaintance rape defendants"); Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 41 (2004) ("Some male judges have tended to identify with a male accused of raping an acquaintance, and go out of their way to protect the alleged rapist with legal barriers."); Torrey, *supra* note 86, at 1055 (collecting studies and other evidence indicating that "judges for the most part seem to adopt and enforce the most insulting myths about rape victims").

142. Nate Jenkins, *Mistrial Is Called After Word 'Rape' Was Banned*, CHI. TRIB., July 13, 2007, at 7. The judge himself declared the mistrial because he worried that prejudicial pretrial publicity concerning his evidentiary ruling might deny the defendant a fair trial. *Id.* The judge did not change his evidentiary ruling, but he decided to continue the trial and possibly move it to another venue. *Id.* The accuser vowed to persevere: "If I have to turn into a human thesaurus . . . I will do it." *Id.* (omission in original).

motivations of women who allege that they have suffered sexual assault: some judges share the popular misconception that complainants are vindictive, greedy, or mentally unstable.[143]

Some judges seem to believe that tort law is ill suited to remediate rape.[144] These judges think that rape allegations belong in criminal proceedings[145] and that accusers who pursue civil remedies are seeking selfish gain rather than serving the public interest.[146] These judges' resistance to civil suits in rape cases also may reflect a view that the indignity and psychological harm that rape causes are

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143. Wendy J. Murphy, *Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 NEW ENG. L. REV. 983, 1006 n.120 (1998) (decrying "judicial bias consistent with the rape myth—that women as a class are vindictive and cry rape for sport"); Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 331, 357–58 (2005) (contending that some judges share societal misconceptions about rape victims' mental instability); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1122 (2001) (explaining that judges distrust complainants "because they are often considered manipulators and liars intent on using the court to achieve some wrongful purpose, such as revenge"); Andrea Giampetro-Meyer & Amy Fiordalisi, *Toward Gender Equality: The Promise of* Paradoxes of Gender *to Promote Structural Change*, 1 WM. & MARY J. WOMEN & L. 131, 140 (1994) (book review) (arguing that "rape victims often are treated with disdain and insensitivity in the courtroom"); Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 346 (2001) (noting that "[s]tudies have shown the prevalence of judicial bias against rape victims").

144. *E.g.*, Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 454 (Cal. Ct. App. 1995) (reversing a trial judge who had pointedly asked the plaintiff what her father thought of her lawsuit for rape); EPSTEIN & LANGENBAHN, *supra* note 46, at 74 (discussing an interview with a judge in Washington state who expressed doubts about whether the civil remedial system would provide a better alternative for a rape victim than the criminal justice system); *see also* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 961–69 (2004) (indicating that judges' insensitivity to the complexities of violence against women creates a hindrance for tort actions in these cases).

145. When judges receive stay requests in parallel civil and criminal proceedings, they are more likely to stay the civil proceedings because they believe the criminal proceedings better serve the public interest. Pollack, *supra* note 138, at 202 (concluding that the "weight of authority" endorses Judge Wisdom's favoritism of criminal proceedings over civil proceedings arising from the same facts; if courts must stay either the criminal or civil action, Judge Wisdom would stay the latter, because the former is in the public interest).

146. Doe v. Shakur, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (suggesting that plaintiffs in rape suits are seeking to advance their selfish interests, whereas accusers in rape prosecutions are advancing public interest); Marah deMeule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145, 159 (2004) (noting that the state judiciary opposed extending rape shield laws to civil cases because civil claimants seek monetary gain, whereas criminal prosecutions vindicate public interest).

not compensable in tort.[147] Occasionally judges seem to believe that a rape survivor should only recover damages for physical harm that required medical care.[148] Because damages cannot make the victim whole, a victim who accepts any damages "acknowledge[s] that the monetary award constitutes all that is owed to her by the wrongdoer for the harms he inflicted upon her."[149] Civil settlements of rape complaints seem to portend the "commodification" of rape and the sanctions prescribed for this crime.[150] Judges' rulings on damage awards have occasionally undervalued the suffering of rape survivors.[151] Some judges have even discounted damage awards in

147. On a national level, the judiciary has repeatedly signaled its lack of enthusiasm for civil litigation in cases involving sexual assault. Various representatives of the federal and state judiciary spoke out against VAWA's civil remedy for rape victims; the opponents did not simply raise concerns about federalism, but they also challenged the wisdom of creating a new civil cause of action for rape. Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 273 (2000) (discussing lobbying by federal and state judges during early debates over the proposal that created VAWA's civil remedy). Regarding these cases as significantly less urgent than criminal prosecutions, both federal and state judges opposed the extension of the rape shield law to cover civil cases. Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 564 (2002) (discussing opposition by the judicial conference and U.S. Supreme Court to the extension of the rape shield laws to civil cases); deMeule, *supra* note 146, at 159 (discussing the states judiciaries' opposition to rape shield laws).

148. *See, e.g.*, Zerangue v. Delta Towers, Ltd., 820 F.2d 130, 133–34 (5th Cir. 1987) (deeming a $228,000 jury award in rape case to be excessive, even though the rapist forcibly dragged the victim to an abandoned house, sexually assaulted her multiple times in an hour-long ordeal, and then left her naked, bound, and gagged; the court found that she only needed minimal medical attention, and therefore her injuries did not merit the jury's award); *see also* Golden, *supra* note 141, at 45–51 (noting division among courts whether rape, in and of itself, is "physical injury" sufficient to state a claim under the Prison Rape Elimination Act); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 440 (1993) (discussing an unpublished New York case in which the judge accepted the defense attorney's argument that rape without physical injury was not violent).

149. Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1162 (2004).

150. Hubbard, *supra* note 135, at 1241 ("[P]retrial settlement commodifies rape because a rapist can 'pay' for a rape after the fact. Rape is not commodified completely because individuals cannot buy and sell rape before the fact, but settlement (and civil litigation generally) creates an imperfect market in which the rape is legitimized, after the fact, for a price. Under this view, complete noncommodification of rape would entail barring all payments of money damages in every civil rape case." (footnote omitted)).

151. *See, e.g.*, Birkner v. Salt Lake County, 771 P.2d 1053, 1061 (Utah 1989) (holding that, in a rape suit trial, the jury could properly consider the alleged victim's prior consensual sexual experience to assess damages); *see also* Schafran, *supra* note 148, at 439 (reviewing the transcript of a New York trial in which the judge found that, "because the victim had been sexually assaulted previously by her father and brothers, the impact of the most recent rape was not as severe for her as it would have been for a first-time rape victim").

rape cases based on notions of comparative fault, such as the plaintiffs' lack of caution in associating with the rapists.[152] Congress is aware of judges' discomfort with civil suits by rape victims: when Congress created new civil remedies for rape victims in 1994, Congress simultaneously established programs for judicial training to ensure that judges would be more sensitive to the plight of rape survivors.[153]

Judges may resent rape suits as a nuisance that hinders the efficient management of judges' dockets. Parallel criminal and civil trials are unwieldy, especially if they occur simultaneously.[154] The judge in each case needs to adjudicate complicated evidentiary motions and discovery disputes.[155] Each judge also needs to resolve arguments about whether to stay one proceeding while the other is pending.[156] Parallel actions create more headaches for judges than a single action would.

In sum, many prosecutors and judges seem to believe that it is wrong to sue for rape, at least while prosecutions of alleged assailants are pending. Though the act of rape qualifies as a tort,[157] and the U.S.

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152. Bublick, *supra* note 110, at 1416 (noting some judicial reduction of damage awards for rape survivors on a theory of "comparative fault" and arguing for limitations on the use of this theory in the adjudication of civil suits for rape).

153. *E.g.*, 42 U.S.C. §§ 13991–92, 14036 (2000) (establishing training programs for judges). In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court acknowledged the "voluminous congressional record" demonstrating "pervasive bias" among state judges in rape cases. *Id.* at 619–20. The Court nonetheless struck down VAWA's civil remedy on the ground that Congress lacked authority to enact this legislation under either the Commerce Clause or the Fourteenth Amendment. *Id.* at 627.

154. Pollack, *supra* note 138, at 204 (suggesting that simultaneous civil and criminal proceedings use judicial resources less economically than successive proceedings because collateral estoppel or res judicata may simplify the litigation of the second matter); Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1035–36 (1985) (simultaneous civil and criminal proceedings "us[e] judicial resources inefficiently" because parties may need to present identical evidence and factfinders may need to decide identical issues).

155. Note, *supra* note 154, at 1036 ("[P]arallel proceedings are likely to produce increased litigation over discovery requests. Because an accused may feel pressure to limit civil discovery, he may make broad use of his privilege against self-incrimination. If the accused's opponent reacts by alleging that the accused has improperly invoked the privilege, motions to compel discovery, opposed by motions for protective orders, will proliferate. Although parties conduct civil discovery largely without judicial supervision, adjudication of disputed discovery requests absorbs additional judicial resources.").

156. Pollack, *supra* note 138, at 203–05 (listing and discussing considerations that guide judges in determining whether or not to grant a stay).

157. Doe v. Mercer, 37 F. Supp. 2d 64, 69 n.9 (D. Mass. 1999) ("Rape . . . is actionable as a civil assault and battery in every State.").

Supreme Court regards rape as the ultimate violation of self,[158] prosecutors and judges seem committed to the primacy of the criminal justice system. Their lack of enthusiasm for rape suits helps to explain why accusers are so vulnerable to impeachment based on parallel civil litigation—a topic to which the next Part now turns.

II. PRESENT RULES PERMITTING IMPEACHMENT OF ACCUSERS BASED ON CIVIL CLAIMS

At present, ample authority allows impeachment of accusers in rape prosecutions with evidence of the accusers' civil claims against the accused or third parties. This Part analyzes evidence codes, case law, and ethical rules that authorize such impeachment.

A. Evidence Codes

The Federal Rules of Evidence provide little specific authority addressing impeachment on the ground of bias. Proponents of such impeachment might cite two rules in the Federal Rules of Evidence: Rule 401,[159] which sets forth the definition of relevant evidence, and Rule 611(b),[160] which allows cross-examination on "matters affecting the credibility of the witness." Counterbalancing these rules is Rule 403,[161] which permits the exclusion of relevant evidence when the judge deems that its prejudicial effect substantially outweighs its probative value. Unfortunately, because Rule 403 depends heavily on the discretion of the trial judge, its application is difficult to predict.

Some states' evidence codes go further than their federal counterpart in guaranteeing the right to impeach witnesses with

158. Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion) ("Short of homicide, [rape] is the 'ultimate violation of self.'" (quoting U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION REPORT, RAPE AND ITS VICTIMS 1 (1975))).

159. Rule 401 of the Federal Rules of Evidence provides as follows: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

160. Rule 611(b) of the Federal Rules of Evidence provides as follows: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." FED. R. EVID. 611(b).

161. Rule 403 of the Federal Rules of Evidence provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

evidence of bias. A number of states have adopted Rule 616 of the Uniform Rules of Evidence,[162] drafted by the National Conference of Commissioners on Uniform State Laws.[163] Rule 616 provides: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against a party to the case is admissible."[164] Other states have included language about bias elsewhere in their impeachment rules.[165] Some states have enacted statutes acknowledging the right to a "thorough and sifting" cross-examination.[166]

Only one rule in the federal and state evidence codes relates directly to the topic at hand. Rule 408, adopted by virtually all jurisdictions, excludes evidence of settlement offers and statements made in the course of settlement negotiations.[167] The purpose of this

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162. *See, e.g.*, DEL. R. EVID. 616; IND. R. EVID. 616; TENN. R. EVID. 616. The states adopting Rule 616 have sometimes modified its language slightly. For example, Rule 616 of the Tennessee Rules of Evidence provides: "A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." TENN. R. EVID. 616.

163. Nat'l Conference of Comm'n on Uniform State Laws, Uniform Rules of Evidence Act (Mar. 8, 2005), http://www.law.upenn.edu/bll/archives/ulc/ure/evid1200.htm.

164. UNIF. R. EVID. 616.

165. *E.g.*, HAW. R. EVID. 609.1(a) ("The credibility of a witness may be attacked by evidence of bias, interest, or motive."); LA. CODE. EVID. ANN. art. 607(d)(1) (2006) ("Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness."); OR. EVID. CODE R. 609-1(1) ("The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest."); S.C. R. EVID. 608(c) ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."); TEX. R. EVID. 613(b) (setting forth the procedure for examining witness concerning bias); *see also* CAL. CIV. PROC. CODE § 877.5 (West 2004) (allowing the admission of evidence concerning bias based on a "sliding scale recovery agreement").

166. *E.g.*, ALA. CODE § 12-21-137 (2005) ("The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him."); GA. CODE. ANN. § 24-9-64 (West 2008) ("The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him.").

167. Rule 408 of the Federal Rules of Evidence provides as follows:

> (a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

rule is to ensure that parties negotiate earnestly without fear that their statements will come in at trial to show their liability.[168] The final sentence of Rule 408 indicates that evidence of settlement negotiations could be admissible if offered for a purpose other than proving a party's fault, such as "proving a witness's bias."[169] Amendments to Rule 408 in December 2006 clarified that the rule extends to criminal proceedings. The commentary to the 2006 amendments highlighted an asymmetry that protects the accused and exposes the accuser to impeachment with settlement negotiations. "An offer or acceptance of a compromise of a civil claim is excluded from all criminal cases if offered against the defendant as an admission of fault because a defendant may offer or agree to settle a litigation for reasons other than a recognition of fault."[170] Yet the accuser remains vulnerable to impeachment based on civil settlement negotiations, because the defendant is not trying to show the accuser's fault—the defendant wants to highlight the accuser's bias. Thus Rule 408 furnishes both a sword and a shield to the accused, who either can introduce evidence of settlement negotiations in the parallel civil case to show the accuser's bias or insist that this topic is off limits.[171]

In sum, the evidence codes give judges wide latitude to allow impeachment of accusers with evidence of civil claims. Some judges instinctively distrust complainants who seek damages for rape.[172] Judges are likely to exercise their discretion to hold the accusers accountable in criminal cases for their perceived avarice in parallel

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> (b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

168. *See* FED. R. EVID. 408 advisory committee's note (citing as a "consistently impressive" justification for the rule "public policy favoring the compromise and settlement of disputes").

169. FED. R. EVID. 408.

170. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 44 (2005), *available at* http://xrint.com/law/us/federal/rules/frsum-2006.pdf; *accord* FED. R. EVID. 408 advisory committee's note.

171. *Cf.* Marbray v. State, No. CACR 07-342, 2007 WL 4181544, at *4 (Ark. Ct. App. Nov. 28, 2007) (reversing a rape conviction after "the State was allowed to elicit from the victim testimony that Marbray came home telling the victim that he was sorry and giving her 'money and stuff'").

172. *See supra* notes 141–43 and accompanying text.

civil cases. Section B collects examples of judicial rulings approving such impeachment.

B. *Case Law*

The case law is replete with appeals in which defendants challenge their rape convictions on the ground that trial courts constrained their impeachment of accusers with evidence of parallel civil litigation. Virtually all courts considering such arguments show unqualified support for the premise that lawsuits compromise the credibility of accusers in criminal cases.[173] The theory is that civil litigation makes the accusers biased because they would personally benefit from a successful result in the criminal proceedings.[174]

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173. *See* Webb v. State, No. 03-04-00004-CR, 2005 WL 1842740, at *8 (Tex. App. Aug. 4, 2005) (mem.) ("Generally, a defendant is permitted to show that the complaining witness has brought a civil suit for damages based on the same occurrence for which the defendant is being prosecuted."). The Ohio Court of Appeals reached a similar conclusion in its survey of the law: "The general rule is that the pendency of a civil action brought against an accused by a witness in a criminal case is admissible as tending to show interest and bias of the witness to prove a motive to falsify, exaggerate or minimize on his part . . . ." State v. Vanek, No. 2002-L-130, 2003 WL 22994979, at *4 (Ohio Ct. App. Dec. 22, 2003) (citations omitted). The court in that case reversed the rape conviction because the defendant lacked the opportunity to cross-examine the complainant based on a parallel civil claim. *Id.*; *see also* People v. Hinton, No. B146149, 2002 WL 1398233, at *8 (Cal. Ct. App. June 28, 2002) (holding, in a rape prosecution, that the relevance of an accuser's parallel civil suit is "well settled"); State v. Godsey, Nos. 03C01-9803-CR-00121, 03C01-9803-CR-00122, 1999 WL 966549, at *4 (Tenn. Crim. App. Oct. 25, 1999) (holding, in a rape prosecution, that "[g]enerally, a civil claim by a victim for injuries inflicted by a criminal defendant is relevant to witness bias"); Wayne F. Foster, Annotation, *Right to Cross-Examine Prosecuting Witness as to His Pending or Contemplated Civil Action Against Accused for Damages Arising Out of Same Transaction*, 98 A.L.R.3d 1060 § 2(a) (1980) ("The general rule is that it is proper for the accused to cross-examine the prosecuting witness as to his pending or contemplated civil action against the accused.").

174. *E.g.*, United States v. Gutierrez, No. SA-05-CR-639-XR, 2007 WL 3026609, at *8 (W.D. Tex. Oct. 16, 2007) (reversing a rape conviction because the defendant could not impeach the accuser with evidence of her intention to file a civil suit); Barboza v. Bissonnette, 434 F. Supp. 2d 25, 37 (D. Mass. 2006) (opining, in a rape prosecution, that "[i]f the family hoped to sue the defendant in a civil suit and thereby win money damages, that fact was relevant to the jury's determination of any bias on the family's part that could shade their testimony against the defendant" (citations omitted)); *Hinton*, 2002 WL 1398233, at *8 ("The victims in this case did have a financial interest that would be served by favoring the prosecution. A guilty verdict reasonably would be seen as aiding their civil suit against defendant's employer at the time of the molestation incidents."); State v. Bowens, 871 So. 2d 1178, 1185 (La. Ct. App. 2004) ("It is the possibility of gain or loss dependent upon the witness' testimony which reveals partiality and interest."); Commonwealth v. Hanford, 937 A.2d 1094, 1098–99 (Pa. Super. Ct. 2007) (reversing a rape conviction because the trial court denied a defense request to introduce a civil complaint filed by the accuser); Webb v. State, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007) (stating that according to the defense, "the fact that the complainant hired an attorney and was considering filing a civil suit against him showed that she had a financial motive for claiming that

According to this view, civil litigation corrupts the accuser.[175] Defendants frequently win reversal of their convictions when they demonstrate that they lacked the opportunity for thorough cross-examination concerning accusers' civil suits.[176]

Some courts have ruled against defendants who appealed the exclusion of impeachment evidence concerning the accusers' civil suits. These courts usually have not disagreed about the pernicious effect of such suits on accusers' credibility. Rather, these courts have upheld convictions because trial courts did in fact afford enough opportunities for defendants to impeach based on parallel civil claims,[177] errors were harmless,[178] or defendants failed to preserve

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[defendant] sexually assaulted her"); Hoover v. State, No. 03-05-00641-CR, 2007 WL 619500, at *3 (Tex. App. Feb. 27, 2007) (mem.) (noting, in a rape prosecution, that "bias or interest may arise when the witness has a financial stake in the outcome of the case"); State v. Wilson, No. 57236-9-I, 2007 WL 2085333, at *2–3 (Wash. Ct. App. July 23, 2007) (stating that defense counsel, in a rape prosecution, told the jury to disbelieve the accuser because she was suing the housing authority for failing to maintain adequate security).

175. State v. Creel, 508 So. 2d 859, 862 (La. Ct. App. 1987) (equating, in rape prosecution, the accuser's civil suit with "bias" and "corruption").

176. *E.g.*, Johnson v. State, 643 S.E.2d 556, 560 (Ga. Ct. App. 2007) (reversing a molestation conviction due to lack of cross-examination concerning the accuser's civil claim); Cunningham v. State, 522 S.E.2d 684, 688 (Ga. Ct. App. 1999) (reversing a conviction for child molestation because the trial court denied cross-examination concerning the accuser's civil suit); *Bowens*, 871 So. 2d at 1186 (reversing a rape conviction because the trial court barred the defendant from questioning the accuser about whether she had hired a civil attorney); Maslin v. State, 723 A.2d 490, 493 (Md. Ct. Spec. App. 1999) (reversing a conviction for sex offenses because the trial court granted the state's motion in limine to preclude reference to the accuser's civil suit); People v. McFarley, 818 N.Y.S.2d 379, 380 (App. Div. 2006) (reversing a rape conviction because the trial court had denied cross-examination of the accuser regarding her intention to file a civil suit); People v. Stein, 781 N.Y.S.2d 654, 655–56 (App. Div. 2004) (reversing a rape conviction because the defendant was unable to impeach the accuser with evidence that she had served her employer with notice of a tort claim); *Vanek*, 2003 WL 22994979, at *4 (reversing a conviction for "sexual imposition" because the defendant lacked the opportunity for cross-examination of the complainant based on her parallel civil claim); Ramirez v. State, 96 S.W.3d 386, 392–96 (Tex. App. 2002) (reversing a police officer's conviction for sexual misconduct because the prosecutor presented evidence at trial that mischaracterized the accuser's pending civil action against the city of Austin, and so the defendant had no chance to cross-examine the accuser concerning the suit).

177. *E.g.*, Savastano v. Hollis, Nos. 02-CV-3299 (JBW), 03-MISC-0066 (JBW), 2003 WL 22956949, at *17 (E.D.N.Y. Oct. 10, 2003) (finding no error in the trial court's limitation of an impeachment concerning a civil suit filed by the family of the an alleged sexual abuse victim because the defendant "could still inquire directly about the mother's supposed monetary motive to fabricate, and this was done repeatedly"); Harkins v. United States, 810 A.2d 895, 898–99 (D.C. 2002) (upholding a conviction for sexual abuse when the defense counsel did in fact examine the accuser about her alleged financial motivations); State v. Louviere, 833 So. 2d 885, 905–06 (La. 2002) (declining to reverse a conviction for rape and other offenses when the defendant did in fact have an opportunity to cross-examine the accuser about a civil suit);

issues for appeal with a timely objection or proffer.[179] Only once in a blue moon has an appellate court declared that civil litigation has scant relevance to the accuser's credibility as a witness for the prosecution.[180]

Poynor v. State, 962 So. 2d 68, 75–76 (Miss. Ct. App. 2007) (noting that the accused had the opportunity to present his theory that the alleged rape victim and her family were motivated by avarice and were seeking damages in a civil lawsuit); *Webb*, 232 S.W.3d at 114–15 (stating that, in a rape case, the defense can generally impeach the accuser with evidence that she has filed or may potentially file a civil claim, but here the prosecution's failure to disclose the accuser's intention to file a claim did not violate *Brady* because the withheld evidence was not material given the strength of the government's other evidence); *Hoover*, 2007 WL 619500, at *4 (assuming that the trial court erred in limiting some evidence of the accuser's financial interest in rape prosecution but finding that the error was harmless because the accuser had made admissions before the jury concerning this subject).

178. *E.g.*, Yeung v. Finn, 160 Fed. App'x 568, 569 (9th Cir. 2005) (holding that the prosecution should have disclosed to the accused that the prosecutor had spoken with the alleged rape victim's civil attorney, but the error was harmless because of the overall strength of the government's evidence); *Bissonnette*, 434 F. Supp. 2d at 37–38 (upholding a rape conviction—even though the trial court erred in prohibiting the defendant from cross-examining the accuser regarding a parallel civil suit—because evidence of the defendant's guilt was so overwhelming that this error was harmless); *Hinton*, 2002 WL 1398233, at *10 (holding, in a rape prosecution, that denying cross-examination about a civil suit was harmless); McCarthy v. State, 749 N.E.2d 528, 532–33 (Ind. 2001) (in sex abuse prosecution, ruling that the trial court erred by denying defendant cross-examination regarding the accuser's civil claim but that the error was harmless); Commonwealth v. Barboza, 763 N.E.2d 547, 555–56 (Mass. App. Ct. 2002) (holding that the trial court erred in prohibiting cross-examination of the accuser about her visit to a civil attorney but upholding the rape conviction because the government's evidence was overwhelming); People v. VanLandingham, No. 241311, 2003 WL 22850027, at *2 (Mich. Ct. App. Dec. 2, 2003) (affirming a conviction for criminal sexual conduct and finding that any error in excluding cross-examination concerning the accuser's civil suit was harmless because of the strength of the government's overall evidence).

179. *E.g.*, Tolbert v. State, No. CACR 02-315, 2003 WL 840955, at *3 (Ark. Ct. App. Mar. 5, 2003) (declining to reverse a rape conviction even though the trial court foreclosed cross-examination of the accuser's attorney concerning the accuser's intent to file a civil suit, because the accused never objected to the attorney's invocation of attorney-client privilege nor asked the trial court to compel the attorney's testimony); Salazar v. State, No. 05-05-01455-CR, 2006 WL 3291049, at *4 (Tex. App. Nov. 14, 2006) (stating, in a prosecution for sexual assault, that, the defendant could not win a reversal based on the denial of cross-examination concerning the potential for parallel civil suits because the defendant did not attempt a timely cross-examination during the trial).

180. Apparently only one court has squarely rejected the premise that rape suits are impeachable. Emphasizing that "crime victims have the right to sue persons who have harmed them," the Wisconsin Court of Appeals upheld a rape conviction even though the trial court excluded evidence that the accuser's family intended to sue. State v. Martine, No. 93-0583-CR, 1993 WL 467905, at *2 (Wis. Ct. App. Nov. 16, 1993). The court found that "[t]here is no inconsistency in pursuing civil remedies in addition to criminal charges." *Id.* Accordingly, the defendant's proposed impeachment of the accuser based on her parallel civil suit had "limited impeachment value." *Id.*

A few examples from published opinions illustrate the tenor of typical cross-examination concerning accusers' parallel civil suits:

> "And you sued [the accused] trying to get money through this rape story of yours, haven't you?"[181]

> "[H]ow much money are you going to make . . . ?"[182]

> "Ma'am, do you expect to get any money out of this case?"[183]

> "[Y]ou are going to take [the accused] for all he's worth?"[184]

Defense attorneys sound similar themes in their summations and arguments:

> "[The accusers] fabricated their testimony as part of a devious plot to generate a lawsuit."[185]

> "[I]f [the accused] were convicted, these lawyers could bring a lawsuit on behalf of [the accuser] that stands to make her a very wealthy woman."[186]

> "[T]he rape allegation was part of [the accuser's] plan to extort money from [the Seattle Housing Authority] . . . ."[187]

> "[The accuser showed] greed and unsavory motives in filing a civil suit."[188]

> "[T]he complaining witness and her mother were lying because of the pendency of a civil lawsuit."[189]

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181. *Louviere*, 833 So. 2d at 905.

182. *McCarthy*, 749 N.E.2d at 532.

183. Pettway v. State, 597 So. 2d 737, 740 (Ala. Crim. App. 1992).

184. Poynor v. State, 962 So. 2d 68, 75 (Miss. Ct. App. 2007).

185. People v. Davis, No. F036806, 2002 WL 1558497, at *13 (Cal. Ct. App. July 15, 2002) (internal quotation marks omitted).

186. Tyson v. State, 626 N.E.2d 482, 486 (Ind. Ct. App. 1993).

187. State v. Wilson, No. 57236-9-I, 2007 WL 2085333, at *2 (Wash. Ct. App. July 23, 2007).

188. People v. Castillo, No. H026086, 2005 WL 236837, at *8 (Cal. Ct. App. Feb. 1, 2005).

189. Powell v. State, 137 S.W.3d 84, 91 (Tex. Ct. App. 2000), *rev'd on other grounds*, 63 S.W.3d 435 (Tex. Crim. App. 2001).

> "[The accuser] believed it would be easy to obtain money from him through a civil lawsuit . . . ."[190]

> "[The accusers'] claims are fabricated and their motive for fabricating these claims is to sue the State and to get rich quick."[191]

> "[The rape prosecution] was about money, [and] . . . money was what she's after."[192]

What is perhaps most striking about the case law is the willingness of courts to admit evidence of parallel suits without a particularized inquiry into relevance. Many courts appear to assume that that impeachment with parallel suits is automatically admissible.[193] As one court indicated, the prospect that an accuser might win a civil recovery is "always a proper subject for cross-examination."[194] Courts do not seem interested in considering specific questions about the nature of the accuser's civil claim or the

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190. Gallardo v. State, No. F03269, 1998 WL 767633, at *2 (Tex. App. Nov. 3, 1998).

191. People v. Davis, No. F03269, 2002 WL 1558497, at *12 (Cal. Ct. App. July 15, 2002) (internal quotation marks omitted).

192. State v. Ross, 685 A.2d 1234, 1237 (N.H. 1996) (internal quotation marks omitted).

193. *See, e.g.*, Pettway v. State, 597 So. 2d 737, 741 (Ala. Crim. App. 1992) (holding that "[i]t is always competent" when cross-examining the accuser or any other witness to inquire about civil claims arising out the same facts at issue in the prosecution); McCarthy v. State, 749 N.E.2d 528, 533 (Ind. 2001) (declaring, in a sex abuse prosecution, that, as a general matter, "[i]f a witness in a criminal trial has a financial motive for testifying in a certain fashion, then the jury should hear about those matters because they are relevant to the question of the witness' credibility"); State v. Bowens, 871 So. 2d 1178, 1185 (La. Ct. App. 2004) (stating a categorical rule that parallel civil suits indicate the accusers' bias and reversing a sexual abuse conviction when the trial court limited cross-examination on this ground); Commonwealth v. Barboza, 763 N.E.2d 547, 556 (Mass. App. Ct. 2002) (holding that the accuser's interest in civil litigation is relevant as a categorical matter); *Ross*, 685 A.2d at 1236 (reversing a conviction for sexual assault because the trial court denied cross-examination concerning the accuser's civil suit and opining that "[i]t is axiomatic that an accused may highlight a complaining witness's interest in the outcome of the accused's case"); People v. Stein, 781 N.Y.S.2d 654, 655 (App. Div. 2004) (concluding without specific analysis that accusers' civil suits are "highly relevant"); State v. Ferguson, 450 N.E.2d 265, 270 (Ohio 1983) (reversing a rape conviction because the trial court denied cross-examination regarding the accuser's lawsuit, and "[i]t is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility"); State v. Vanek, No. 2002-L-130, 2003 WL 22994979, at *4 (Ohio Ct. App. Dec. 22, 2003) (following the general rule that evidence of parallel suits is admissible to impeach accusers in rape prosecutions); Webb v. State, No. 03-04-00004-CR, 2005 WL 1842740, at *8 (Tex. App. Aug. 4, 2005) (mem.) (discussing the general rule admitting evidence of a civil claim to show the accuser's bias, without mentioning the need for particularized inquiry into its relevance in each case).

194. Cunningham v. State, 522 S.E.2d 684, 688 (Ga. Ct. App. 1999) (reversing a conviction because the trial court did not permit cross-examination concerning the accuser's civil suit).

circumstances in the criminal trial at the time the accused offers the evidence.[195] Perhaps because bias is universally considered to be a material topic,[196] courts do not spend much time considering the probative value of each particular piece of evidence offered to impeach accusers based on civil litigation.

Some appellate courts have insisted that the *mere possibility* of tort claims provides a ground for impeachment of accusers in rape prosecutions. Thus, when accusers have not yet filed civil complaints or even any formal notice of tort suits, impeachment of accusers based on the *potential* for such suits is permissible.[197] A defendant could impeach an accuser who spoke with a civil attorney, relative, or friend about the possibility of filing a civil claim.[198] Some courts do not allow impeachment if accusers have not yet manifested any interest in

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195. For a detailed discussion of relevance, see i*nfra* Part III.A.1. For a list of factors that should bear on the relevance of such impeachment evidence, see *infra* Part IV.A.

196. 17 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6095 (2d ed. 2007) (indicating that "the law regards proof of bias as a particularly favored basis for attacking witness credibility"). The Supreme Court held in *United States v. Abel*, 469 U.S. 45 (1984), that "[p]roof of bias is almost always relevant" in a criminal trial. *Id.* at 52. This holding does not mean that all evidence of purported bias is admissible. The particular ground for bias cited by the proponent must be material, and the evidence must have probative value. *See infra* Part III.A.1.

197. *See, e.g.*, State v. Arlington, 875 P.2d 307, 315 (Mont. 1994) (indicating that the majority rule in the United States allows the impeachment of accusers regarding the mere potential to sue the accused); Webb v. State, 232 S.W.3d 109, 114–15 (Tex. Crim. App. 2007) (noting, in a rape prosecution, that a complainant who had not yet filed a civil claim could have been impeached concerning her potential to file the claim; failure of prosecution to disclose that she was considering a claim did not violate *Brady*, however, because it was not material in light of all the evidence in this case). *See generally* 98 C.J.S. *Witnesses* § 652 (2007) (indicating that the "defense counsel in a criminal case is entitled to cross-examine the victim or complaining witness regarding any *pending* or contemplated civil suit against the accused when the civil suit involves the same parties and arises out of the same set of circumstances or events giving rise to the criminal case" (emphasis added) (citations omitted)).

198. *E.g.*, Yeung v. Finn, 160 Fed. App'x 568, 569–70 (9th Cir. 2005) (holding that the prosecution should have disclosed to the accused that the prosecutor had spoken with the civil attorney of the alleged rape victim, but the error was harmless due to the overall strength of the government's evidence); Barboza v. Bissonnette, 434 F. Supp. 2d 25, 37 (D. Mass. 2006) (finding error when the trial court hearing the rape prosecution denied the defendant an opportunity to cross-examine the family of the accuser concerning a meeting with a civil attorney); *Bowens*, 871 So. 2d at 1186 (reversing a rape conviction because the trial court barred the defendant from questioning the accuser about whether she had hired a civil attorney); State v. Whyde, 632 P.2d 913, 916 (Wash. Ct. App. 1981) (reversing a rape conviction and listing cases requiring the opportunity for impeachment concerning the accuser's possible intention to file a civil suit); *cf.* State v. Kooyman, 112 P.3d 1252, 1266 (Utah Ct. App. 2005) (noting in dicta that a defendant in a sex abuse prosecution was able to cross-examine the accuser about her conversation with a civil attorney, even though she had not decided whether to file a civil suit).

civil litigation,[199] but other courts seem inclined to permit impeachment concerning the mere possibility of civil recovery.

C. Ethical Rules

Conceivably, the rules of ethics for lawyers might constrain harsh cross-examination of accusers in rape prosecutions. Rule 4.4(a) of the ABA Model Rules of Professional Conduct (Model Rules) provides as follows: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[200] Subpart 5 of the preamble to the Model Rules states that a lawyer "should use the law's procedures only for legitimate purposes and not to harass or intimidate others."[201] The ABA Standards Relating to the Administration of Criminal Justice provide that "[t]he interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily."[202]

In reality, these various rules of ethics have very little effect on lawyers' treatment of witnesses during cross-examination. The rules are difficult to enforce, in part because proof of a violation requires some indication that the cross-examining attorney had an improper purpose. All of these rules permit tough questioning unless its sole purpose is to traumatize the witness. Very few lawyers would admit such a purpose. The difficulty of enforcing these rules may explain the dearth of published opinions interpreting them.[203]

A more fundamental problem is that many defense lawyers believe they have an ethical duty to cross-examine accusers as

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199. *E.g.*, Demetrios v. State, 541 S.E.2d 83, 88 (Ga. Ct. App. 2000) (holding, in a rape prosecution, that the trial court properly barred the defendant from cross-examining the accuser about whether she intended to file a civil suit when she had not yet talked about any suit with an attorney and there was no other evidence that she had manifested an intent to file a suit); State v. Patton, 598 N.E.2d 777, 779 (Ohio Ct. App. 1991) (opining that the exclusion of impeachment concerning the accuser's civil suit is only a reversible error if there is a civil action pending or the accuser has "taken other affirmative steps in contemplation of a civil suit").

200. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2007). As of June 2007, forty-four states have adopted some version of this rule.

201. MODEL RULES OF PROF'L CONDUCT pmbl.

202. CRIMINAL JUSTICE SECTION STANDARDS § 4-7.6(a).

203. *See generally* Lininger, *supra* note 74, at 1389 (noting that bar disciplinary panels rarely enforce Rule 4.4(a)). On January 14, 2008, a WESTLAW search in the ALLCASES database for "'Rule 4.4(a)' /50 cross-examin!" did not turn up any cases.

zealously as possible.[204] In rape cases, some lawyers even engage in abusive conduct toward accusers because they feel their duty of zealous advocacy requires it.[205] A few ethics scholars have urged defense lawyers to restrain their examinations of accusers in rape cases,[206] but this perspective remains a minority view. It is safe to say that the rules of ethics do not exert much restraining influence on criminal defense attorneys who are contemplating whether to impeach accusers with evidence of parallel civil suits. To the contrary, the rules of ethics seem to mandate aggressive cross-examination using all strategies not explicitly proscribed by the rules of evidence.[207]

III. CONSIDERING THE CASE FOR REFORM

Part II has shown that courts generally—and often uncritically—admit evidence of an accuser's parallel civil litigation and that the evidentiary and ethical rules do not restrain this practice. Part III evaluates whether a new approach would be more appropriate. Section A considers the case for restrictions on the impeachment of accusers with evidence of parallel civil suits. Section B discusses some of the arguments for allowing such impeachment

A. Reasons to Limit Impeachment with Evidence of Civil Claims

The analysis in this Section proceeds in four steps. Part III.A.1 assesses the relevance of impeachment that refers to civil suits. Part III.A.2 considers the countervailing concern of prejudice toward the defendant. Part III.A.3 focuses on the tendency of this impeachment to hinder rape victims' use of the civil remedial system. Part III.A.4

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204. *See* Albert W. Alschuler, Essay, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 293 (1998) (describing the view of O.J. Simpson's defense team that "a lawyer is obliged to do everything useful on behalf of a client that the law does not forbid"); Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1727 (2002) (extolling zealous advocacy by lawyers).

205. *See* TIMOTHY BENEKE, MEN ON RAPE 104–05 (1982) (asserting that a defense lawyer should play on jurors' stereotypes to win an acquittal in rape cases because, by failing to do so, he would forego a potentially winning strategy).

206. *E.g.*, David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman*, 90 COLUM. L. REV. 1004, 1026 (1990) (disavowing harsh cross-examination of rape victims).

207. ANDREW E. TAZLITZ, RAPE AND THE CULTURE OF THE COURTROOM 81–93 (1999) (noting that defense attorneys' interpretation of ethical rules can countenance ruthless cross-examination of accusers in rape cases, such as in the prosecution of William Kennedy Smith).

explores the risk of deterring victims from cooperating with law enforcement.

1. *Questionable Relevance.* Relevance is a necessary, but not sufficient, condition for the admission of evidence.[208] Relevance consists of two components: materiality and probative value.[209] Materiality is the importance of the point to be proven—the point must matter to be material.[210] Probative value is the evidence's ability to prove the point in question.[211]

Bias is definitely material.[212] Bias is an ulterior motive, loyalty or antipathy that causes witnesses to shade their testimony.[213] It is not simply a strong interest in the outcome of a trial; it is an interest that might cause witnesses to alter their stories.[214]

To show bias, the impeaching party at least must show that (1) the witness has a motive distinct from already known, unimpeachable motives[215] and (2) the witness's additional motive could skew the witness's story.[216] If either component is absent, the motive is not

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

209. *See* FED. R. EVID. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

210. *Id.* (requiring that evidence must bear on a "fact that is of consequence to the determination of the action").

211. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 153–59 (3d ed. 2003).

212. United States v. Abel, 469 U.S. 45, 52 (1984).

213. *See* Barboza v. Bissonnette, 434 F. Supp. 2d 25, 37 (D. Mass. 2006) (in a rape prosecution, opining that the accused is entitled to cross-examine witnesses about matters "that could shade their testimony against the defendant" (citations omitted)); Webb v. State, No. 03-04-00004-CR, 2005 WL 1842740, at *8 (Tex. App. Aug. 4, 2005) (mem.) (indicating that evidence of an alleged bias is relevant to the extent that the evidence shows that the "witness may shade his testimony").

214. MUELLER & KIRKPATRICK, *supra* note 211, at 466–68.

215. The requirement of a distinct motive derives from two sources: the language in Rule 403 of the Federal Rules of Evidence that limits the admission of "cumulative" evidence, *see* FED. R. EVID 403, and the language in Rule 401 of the Federal Rules of Evidence that requires all evidence to have incremental probative value, *see* FED. R. EVID 401.

216. The potential impact on the witness's testimony is the "bottom-line" inquiry in evaluating evidence of bias. "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." *Abel*, 469 U.S. at 51.

material, and it is not cognizable as bias for purposes of the impeachment rules.

Redundancy limits materiality. So, for example, when the jury knows that a witness is the parent of one party, there is slight materiality in adding that the witness may have other ties to that party or may share financial interests with that party.[217] A baseline of bias in such a case reduces the marginal materiality of new asserted grounds for bias. As another example, courts in criminal prosecutions generally do not allow parties to impeach the accused for simultaneously defending a civil suit alleging the same facts as the prosecution. The additional motive to avoid civil liability is of limited materiality because the accused already has strong selfish motivation to avoid punishment.[218] Motives only amount to impeachable bias if they provide *distinct*, *substantial* reasons to slant testimony.[219]

Does an accuser's civil litigation necessarily give rise to bias? Courts answering in the affirmative seem to presume that the motives of accusers in criminal prosecutions are divergent from the motives of plaintiffs in civil suits. According to this view, accusers in criminal prosecutions have a public, altruistic motivation, whereas civil plaintiffs seek personal gain.[220] This supposed dichotomy cannot

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217. For example, when a witness already had strong enmity against the accused because she believed that he killed her husband, the suggestion that she had additional unfavorable motivations due to her civil suit against the accused was of negligible materiality. State v. Salazar, 707 P.2d 951, 954 (Ariz. Ct. App. 1985); *see also* People v. Chapman, No. C039884, 2003 WL 22064345, at *5 (Cal. Ct. App. Aug. 29, 2003) (holding that there was only slight relevance in the proposed impeachment of the accuser's mother concerning a civil suit filed against the accused, because "[t]he mother was hardly an impartial witness; she was the mother of the alleged victim").

218. *See* State v. Ahmed, No. 84220, 2005 WL 1406282, at *12 (Ohio Ct. App. June 16, 2005) (holding the prosecution's questions regarding the defendant's retention of a civil attorney to be irrelevant and nonprejudicial).

219. *See Abel*, 469 U.S. at 54–56 (holding that evidence that the witness and the accused were both members of the Aryan Brotherhood, that members of this prison gang took an oath to lie for each other, and that violations of the oath were punishable by death was sufficient to state a ground for bias in favor of the accused); Giglio v. United States, 405 U.S. 150, 154–55 (1972) (holding that evidence that the government witness, who himself was vulnerable to prosecution, had received promises of leniency in exchange for cooperation in the trial of the accused was sufficient to show witness's bias); *see also* FED. R. EVID. 401 (suggesting that a motive to avoid civil liability would only constitute 'relevant evidence' if it had the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

220. *See* Doe v. Shakur, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (suggesting that plaintiffs in civil rape suits are seeking to advance their selfish interests, whereas accusers in rape prosecutions are advancing the public interest); State v. Arline, 612 A.2d 755, 759–60 (Conn.

withstand close scrutiny. Rape victims often initiate criminal proceedings for "selfish" reasons: a desire for personal protection, an interest in vindication or retribution, or even a desire for compensation through restitution from defendants or payments from state victim compensation funds.[221] Thus the interests that lead rape survivors into the criminal and civil justice systems are actually quite similar—perhaps even duplicative. These reasons certainly defy a facile categorization along a public/private axis.[222] Because the reasons for victims' participation in the criminal and civil justice systems are alike in many ways, the materiality of an accuser's selfish motivation is questionable. To put it differently, the accuser already has a baseline of selfish inclination to assist the prosecution even without consideration of civil litigation. The presumption that an accuser would be a neutral witness but for the corrupting influence of a civil suit is dubious.[223]

1992) (indicating that rape suits are impeachable because "the outcome of the prosecution may be beneficial to the prosecuting witness"); State v. Bowens, 871 So. 2d 1178, 1185–86 (La. Ct. App. 2004) (reversing a rape conviction when the defendant could not cross-examine the accuser about whether she had hired a civil attorney because the existence of civil litigation might "indicate that the witness has an interest in the criminal case or is otherwise not totally impartial"); deMeule, *supra* note 146, at 159 (noting that the state judiciary opposed the extension of rape shield laws to civil cases because rape claimants seek monetary gain, whereas criminal prosecutions vindicate public interest); *see also* Wooten v. State, 464 So. 2d 640, 642 (Fla. Dist. Ct. App. 1985) (holding that cross-examination about an accuser's civil litigation was necessary to explore whether she was "actuated by personal considerations instead of altruistic interest generated solely from motives in the public interest to bring a criminal to justice" (quoting State v. Doughty, 399 A.2d 1319, 1324 (Me. 1979))).

221. *See* James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1226 (2004) ("Securing retribution and redressing the victim encompasses . . . the entire penal *raison d'être*."); Pokorak, *supra* note 20, at 726 (suggesting that in rape prosecutions, "the promise of restitution or victim compensation appears to victims to be identical to personal injury awards"); Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, PROSECUTOR, Nov./Dec. 2006, at 14 (explaining that victims in sexual assault cases seek self-empowerment and attempt "to master their situations" and "regain control over their lives").

222. Courts construing the Federal Rules of Evidence have rejected the public/private taxonomy of motivation in other contexts such as the hearsay rule's former testimony exception. For example, in *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), the Third Circuit recognized that the motivation for a criminal prosecution might be very similar to the motivation for a private action arising from the same facts—so similar, in fact, that the prosecuting authority could qualify as a "predecessor in interest" of the later private claimant for purposes of the former testimony exception under Rule 804(b)(1) of the Federal Rules of Evidence. *Id.* at 1186–87.

223. Some courts have recognized the fallacy of this presumption. *See, e.g.*, Reeves v. State, 432 So. 2d 543, 546–47 (Ala. Crim. App. 1983) (finding no harm when the trial court prohibited the accused from cross-examining the accuser about her parallel civil suit seeking damages for

On the subject of materiality, it is important to answer emphatically the question that frames this Article. Lawsuits for rape are not wrong or shameful. Rape survivors deserve civil remedies as much as any other claimants in the civil system.[224] Rape suits were unusual in this country until recently—due to factors unrelated to the merit of these suits, such as sexism, stigma, and the lack of a specialized bar—but now rape suits are becoming more commonplace. Government agencies at the federal and local levels encourage rape survivors to consider civil recourse, and courts should not presume ill motives on the part of claimants who follow the government's advice.[225] The notion that a rape suit is intrinsically wrong should not continue into the new millennium.

Even assuming *arguendo* that accusers' selfish motivations might be material, courts must carefully sort through evidence of parallel civil litigation to assess their probative value. The rule that allows impeachment for bias whenever an accuser has filed a tort suit[226] is both overinclusive and underinclusive. The rule is overinclusive because not all plaintiffs in tort actions seek financial gain: sometimes claimants sue third-party defendants to force adoption of safeguards that will prevent future rapes.[227] Further, the rule is underinclusive because it reaches only a fraction of rape victims who intend to file

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rape, because the nature of the alleged crime made her highly prejudiced against the defendant irrespective of her potential to recover damages); People v. Murray, 261 P. 740, 742 (Cal. Dist. Ct. App. 1927) (finding no error in prohibiting cross-examination of the accuser regarding her civil complaint, because the purpose of this cross-examination was to show her hostility toward the defendant, which was amply apparent in her testimony already).

224. *See* State v. Martine, No. 93-0583-CR, 1993 WL 467905, at *2 (Wis. Ct. App. Nov. 16, 1993) (holding, in a rape prosecution, that "[t]here is no inconsistency in pursuing civil remedies in addition to criminal charges," so evidence of a parallel civil suit "has limited impeachment value").

225. *Cf.* Doyle v. Ohio, 426 U.S. 610, 617–18 (1976) (holding that prosecutors may not discuss post-*Miranda* silence because the suspect who invokes his *Miranda* rights is acting on the government's advice, and there should be no inference of unsavory motives when he follows the officers' suggestion that he remain silent).

226. For a discussion of courts' generally uncritical admission of such evidence, see *supra* Part II.B.

227. *See, e.g.*, People v. Davis, No. F036806, 2002 WL 1558497, at *4–5, 13–14 (Cal. Ct. App. July 15, 2002) (indicating that accusers, female corrections officers, in a rape prosecution, filed a parallel civil suit for purposes other than financial gain—including to force changes within the California Department of Corrections, "to ensure that this did not happen to other victims," and to "help[] other women" by donating the proceeds from their lawsuit to a local rape crisis center).

tort claims.[228] An accuser can evade impeachment on this subject if the accuser simply postpones filing a tort claim until the close of evidence in the prosecution[229] or arranges to keep the tort claim notice secret.[230] Assuming that an interest in civil remedies is tantamount to bias, a rule that gauges this interest based solely on publicly filed documents will uncover only a fraction of the bias it seeks to expose.[231] Furtive plaintiffs—those for whom impeachment is perhaps the most important—are the least likely to be accountable.[232] The rule rewards gamesmanship instead of revealing it.

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228. *See* Tessmer v. State, 539 S.E.2d 816, 820 (Ga. 2000) (holding, in a prosecution for murder that culminated a history of sex abuse, that the government did not violate *Brady* by withholding evidence that the victim's mother was "thinking about" a lawsuit, but had not yet decided what to do, and that this information was not material because she had not yet made up her mind or taken any step toward filing a suit); Demetrios v. State, 541 S.E.2d 83, 88 (Ga. Ct. App. 2000) (suggesting that the majority rule would bar impeachment of accusers who have not yet filed suit or manifested any intention to file suit).

229. *E.g.*, People v. Smith, No. 238005, 2003 WL 22301047, at *10 (Mich. Ct. App. Oct. 7, 2003) (affirming the trial court's denial of the defendant's motion for a new trial to show the jury that the accuser, who did not file suit against the defendant until two days after the sentencing hearing, sought financial gain); Webb v. State, 232 S.W.3d 109, 111, 114–15 (Tex. Crim. App. 2007) (holding, in a rape prosecution, that "[t]he trial judge did not abuse his discretion in denying the motions for mistrial" when the prosecutor asked the complainant's civil attorney to postpone filing a civil suit to avoid interference with the criminal trial); Salazar v. State, No. 05-05-01455-CR, 2006 WL 3291049, at *4 (Tex. App. Nov. 14, 2006) (in a sexual assault prosecution, upholding the trial court's denial of defense cross-examination concerning the accuser's civil suit when the accuser did not file the claim until after the criminal jury began deliberations, because the accused's attempted cross-examine was not timely); State v. Swenson, Nos. 36025-6-I, 38742-1-I, 1997 WL 369477, at *2 (Wash. Ct. App. July 7, 1997) (per curiam) (affirming the trial court's rejection of the defendant's request for a retrial based on the accusers' filing of a civil suit a few months after the defendant's conviction for sexual abuse).

230. In *People v. Stein*, 781 N.Y.S.2d 654 (App. Div. 2004), the government prosecuted a public school teacher for allegedly raping and sexually abusing students. *Id.* at 655. The civil attorney filed tort claim notices against the school district before the end of the criminal trial, but the attorney managed to keep these notices confidential. *Id.* at 656. The appellate court in *Stein* reversed the conviction because the prosecutor had known about the tort claim notices and failed to disclose them to the accused. *Id.* at 655.

231. For example, the media and pundits heaped invective on Kobe Bryant's accuser for filing a civil claim against him in August 2004. She had actually contemplated that claim for the entire preceding year, however, so her motives in the prosecution were arguably "tainted" throughout that prior one-year period. Johnson, *supra* note 108 ("But a civil action has also apparently been contemplated for much longer than a few days. The lawyer who filed the suit, John C. Clune, called a prominent former sex crimes prosecutor, Linda Fairstein, more than a year ago to solicit her advice about a possible civil case . . . .").

232. *See* State v. Buss, 887 P.2d 920, 925 n.3 (Wash. Ct. App. 1995) (holding that courts must permit defendants to impeach accusers for intending to file a civil claim, because accusers otherwise "would not be in any particular hurry to file a civil action which would make them appear biased when testifying in the criminal proceeding").

On the other hand, a broader impeachment rule—one allowing impeachment based on the mere *potential* for a civil suit[233]—is even less likely to yield evidence with probative value. The potential to file a lawsuit should not be sufficient to allow impeachment, because virtually *every* victim of violent crime has a potential tort claim.[234] Do all victims lack credibility simply because they could theoretically sue for damages? Some courts attempt to draw the line by allowing impeachment of an accuser who has visited with a civil attorney,[235] but this demarcation does not make sense either. Victims might seek an attorney's advice regarding a number of topics, including their rights to testify in the criminal case, their desire to protect their privacy, or their interest in obtaining a restraining order.

The scant probative value of impeachment based on civil suits becomes even clearer when one considers that the subject of restitution is generally off-limits for impeachment. Victims of crime can obtain restitution at the time of sentencing.[236] In a restitution order, the court directs the offender to pay for the victim's losses. Rape survivors can obtain restitution for medical services, rehabilitation, temporary housing, child care expenses, lost income, attorney's fees, and "'any other losses suffered by the victim as a

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233. *See, e.g.*, *Smith*, 2003 WL 22301047, at *10 (noting that, in a trial for criminal sexual conduct, the "defendant vigorously cross-examined the complainant regarding her potential filing of a civil suit," even though the complainant denied hiring an attorney or planning to file a civil suit); *Swenson*, 1997 WL 369477, at *3 (stating that the defendant in a sexual abuse prosecution had the opportunity to question accusers about the potential of them filing a civil claim); *Buss*, 887 P.2d at 924–25 (finding that the trial court erred during a rape prosecution when the court disallowed impeachment based on a potential suit by accuser's family, even though the prosecutor insisted that the possibility of a lawsuit was merely speculative).

234. Professor Lynne Henderson has recognized that "all crime victims at least in theory have the right to sue perpetrators in tort for damages." Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1615 (1996) (reviewing GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995)); *see also, e.g.*, *Webb*, 232 S.W.3d at 114–15 (holding that there was no *Brady* violation when the prosecution did not disclose that the accuser was considering filing a civil claim and remarking that "[t]he possibility that a civil suit will be filed after a criminal trial should not be news to any defense attorney").

235. *E.g.*, Yeung v. Finn, 160 F. App'x 568, 569 (9th Cir. 2005) (holding that the prosecution should have disclosed to the accused that the prosecutor had spoken with the alleged rape victim's civil attorney, but error was harmless because of the strength of the government's evidence); Barboza v. Bissonnette, 434 F. Supp. 2d 25, 37–38 (D. Mass. 2006) (finding error when the trial court, during a rape prosecution, denied the defendant an opportunity to cross-examine the family of accuser concerning a meeting with a civil attorney); State v. Bowens, 871 So. 2d 1178, 1186 (La. Ct. App. 2004) (reversing a rape conviction because the trial court barred the defendant from questioning the accuser about whether she had hired a civil attorney).

236. The court may order the offender to make restitution immediately, or the court may include restitution among the conditions for probation or parole. Pokorak, *supra* note 20, at 726.

proximate result of the offense.'"[237] There is very little practical difference between restitution and a civil tort action.[238] In the victims' eyes, restitution is basically the same as civil litigation.[239] But courts hardly ever allow impeachment of accusers with evidence that they intend to seek restitution.[240] Given the consensus that accusers' interest in restitution lacks probative value as a ground for impeachment, it is difficult to understand why accusers' interest in civil litigation indicates suspicious motives.

Similarly, courts do not allow impeachment of accusers based on their requests for payments from crime victim compensation boards. These boards provide compensation for the following expenses, among others: medical bills, lost wages, transportation costs, housing costs, day care expenses, and legal fees.[241] Although an accuser's

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237. Amy J. Sepinwall, *Defense of Others and Defenseless "Others*," 17 YALE J.L. & FEMINISM 327, 367 (2005) (quoting 18 U.S.C. § 2264(b)(3)(F) (2000), a provision of the federal VAWA statute); *see also* Pokorak, *supra* note 20, at 726 (listing categories of restitution available to survivors of rape).

238. State v. Martin, No. 99-0518, 2000 WL 231160, at *4 (Wis. Ct. App. Mar. 1, 2000) (noting that, in terms of relevance in establishing bias, evidence of an accuser's civil suit and evidence of an accuser's restitution request are cumulative at best).

239. Pokorak, *supra* note 20, at 726 (explaining that victims regard restitution as very similar to a personal injury award, and prosecutors argue for restitution as if it were a personal injury award).

240. Many courts do not believe that the victim's interest in restitution is relevant to bias. *E.g.*, State v. Michaels, No. 39339-1-I, 1997 WL 785646, at *3 (Wash. Ct. App. Dec. 22, 1997) (per curiam) ("Unlike the filing of a civil suit, mere participation in a criminal action that may result in restitution does not affirmatively and unambiguously demonstrate a financial interest in the outcome of the prosecution. Nor does it have the same tendency to show ill-will."); *see also* State v. Mercer, 106 P.3d 1283, 1292 (N.M. Ct. App. 2004) (holding that the trial court correctly barred impeachment of the prosecution's witness with evidence that he sought restitution); *Martin*, 2000 WL 231160, at *4 (denying a request for a new trial because newly discovered evidence of the accuser's interest in restitution was not material and the defense did not demonstrate misconduct by the accuser or the government in withholding this evidence at the time of trial). One practical problem is that the topic of restitution generally does not come up until the time of sentencing—several weeks after the trial of the accused—so the accuser's interest in restitution is not manifest at the time of trial. Another obstacle to impeachment based on restitution is that trial judges generally do not want jurors to consider the sentencing consequences of their verdicts. *See* United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1991) ("It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict."). People v. Lee, No. A078429, 1999 WL 595455, at *7 (Cal. Ct. App. July 27, 1999) ("A jury may not consider the subject of penalty or punishment in determining the question of a defendant's guilt.").

241. Nat'l Ass'n of Crime Victim Comp. Bd's, Crime Victim Compensation: An Overview, http://www.nacvcb.org/articles/Overview_01.html (last visited Feb. 8, 2008):

> Compensation programs can pay for a wide variety of expenses and losses related to criminal injury and homicide. Beyond medical care, mental health treatment,

interest in payment from a victim compensation board seems strikingly similar to the accuser's interest in civil litigation,[242] courts generally bar impeaching the accuser for applying for victim compensation.[243] Again, the courts seem to assume that civil litigation has a uniquely pernicious quality that undermines the credibility of accusers. The courts' aversion to civil litigation and tolerance of other remedial systems is inexplicable when all of these systems offer approximately the same categories of compensation.

There is yet another reason to doubt the probative value of impeachment citing an accuser's civil claim: success in the criminal prosecution does not necessarily advance the civil action.[244] Evidence from the criminal prosecution is not necessary or sufficient for the accuser to prevail in the civil suit, and it may be inadmissible in the civil case.[245] The verdict or judgment in the criminal prosecution is not

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funerals, and lost wages, a number of programs also cover crime-scene cleanup, travel costs to receive treatment, moving expenses, and the cost of housekeeping and child care. And states continue to work with victims and advocates to find new ways to help victims with more of the costs of recovery.

242. *See* Pokorak, *supra* note 20, at 726 (indicating that "victim compensation appears to victims to be identical to personal injury awards").

243. Whaley v. Thompson, 22 F. Supp. 2d 1146, 1164–65 (D. Or. 1998) (holding, in a rape prosecution, that the prosecutor did not commit misconduct by withholding evidence that accuser had applied for aid from the Victim's Assistance Program); State v. Dines, No. 57661, 1990 WL 166452, at *3–4 (Ohio Ct. App. Nov. 1, 1990) (holding, in a rape prosecution, that trial court did not err in excluding evidence that the victim's family "was motivated to give false testimony in hopes of collecting funds from the Victims of Crime Fund"); Hoover v. State, No. 03-05-00641-CR, 2007 WL 619500, at *3 (Tex. App. Feb. 27, 2007) (mem.) (holding, in a rape prosecution, that the trial court properly barred the accused from impeaching the accuser on the grounds that she had applied for and received compensation from the Crime Victims' Compensation Program at the Texas attorney general's office, because "[t]he proffered evidence does not show a tendency to lie, and it is only marginally probative on the issue of bias or motive").

244. A criminal conviction is not required for a complaint to prevail in a civil suit for rape. *See* State v. Quatrevingt, 670 So. 2d 197, 210 & n.13 (La. 1996) (noting, in a rape and murder case with a parallel civil claim, that "success in a civil suit does not depend on obtaining a guilty verdict in a criminal trial," so the defendant's attempted impeachment of the accuser concerning details of a civil suit would be only "marginally relevant"). The probative value of a conviction is questionable when the defendant is suing third-party defendants such as landlords and hotel owners for maintaining unsafe premises; the fact that a rape occurred, not the culpability of a particular rapist, is crucial in such a case. *See* State v. Langston, 889 S.W.2d 93, 98 (Mo. Ct. App. 1994) ("The relevant issue in the victim's suit against the hotel was not whether defendant was the perpetrator of the crime, but whether a crime was committed in the hotel.").

245. *See, e.g.*, FED. R. EVID. 804(b)(1); N.C. R. EVID. 804(b)(1); OHIO R. EVID. 804(b)(1) (prohibiting admission of transcribed testimony from prior proceeding unless current opponent, or predecessor in interest, had opportunity and similar motive to develop testimony in prior setting). These state rules are merely examples; each federal rule has many state counterparts.

necessarily admissible in the civil trial, especially if the tort at issue in the civil trial has different elements from the offense at issue in the criminal prosecution.[246] The prosecutor's victory may actually limit recovery in the civil case, because an incarcerated defendant cannot earn money to pay damages, and the civil jury may be more sympathetic to a sentenced defendant who has already paid a price in the criminal justice system. If assisting the prosecution does not advance the civil suit, there is little reason to presume that the accuser will shade any criminal testimony because of the parallel civil litigation.[247]

Some third-party litigation is particularly likely to lack probative value as a ground for impeachment of accusers.[248] For example, a suit alleging that a landlord or hotel owner failed to keep premises secure does not depend on proof of a particular assailant's identity, so long as the plaintiff can show that the rape occurred on the premises.[249] Similarly, third-party plaintiffs' suits (e.g., a suit by the accuser's relative against the alleged perpetrator) have limited probative value in impeaching the accuser unless the accuser is a party to the suit.[250]

See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5009 (2d ed. supp. 2007) (listing the forty-two states that have recodified their evidence rules in response to the Federal Rules).

246. *See* Schlegel, supra note 112, at 137–38 ("[C]ivil cases usually involve more than one detailed separable issue, and therefore, the criminal judgment might not be clearly applicable to the issue in the subsequent suit."). Third-party suits are particularly likely to involve elements distinct from those at issue in criminal prosecutions.

247. Conceivably a conviction could be helpful in some civil suits, but the point here is to show the folly of a blanket rule allowing impeachment of every accuser with a parallel civil claim. The tendency of a criminal conviction to advance a civil claim needs case-by-case examination, because without this lynchpin, impeachment with evidence of parallel litigation does not make much sense.

248. *See, e.g.*, State v. Wilson, No. 57236-9-I, 2007 WL 2085333, at *2–3 (Wash. Ct. App. July 23, 2007) (confirming the trial court's finding that the accuser's suit against the Seattle Housing Authority was only "'very tangentially' relevant" to the prosecution of the alleged rapist).

249. *See* Falls v. Brinkman, No. 89-16480, 1990 WL 186813, at *1 (9th Cir. Nov. 29, 1990) (affirming the exclusion of the defendant's cross-examination of the accuser about a possible third-party suit against the hotel where the sexual assault occurred and observing that the suit only had "slight, if any, relevance to the sexual assault charges"); *Langston*, 889 S.W.2d at 98 (holding that, in a prosecution for sexual abuse and related offenses, "evidence about the [accuser's] civil action against the hotel was irrelevant to defendant's conviction for the crime charged [because t]he relevant issue in the victim's suit against the hotel was not whether defendant was the perpetrator of the crime, but whether a crime was committed in the hotel").

250. Poynor v. State, 962 So. 2d 68, 75–76 (Miss. Ct. App. 2007) (in a rape prosecution, holding that the trial court did not abuse its discretion in finding that the victim's family member's conversation with an attorney about a possible tort claim was only relevant regarding the family member's credibility and not the accuser's credibility).

As a general matter, the more attenuated the civil litigation is to the prosecution, the less likely it will offer probative value as a basis for impeachment of an accuser in a criminal prosecution. Moreover, civil litigation that rests on theories of third-party recovery will require explanation to the jury in the criminal prosecution, and this explanation could prove time-consuming and distracting.

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Finally, it is important to bear in mind that the criminal defense attorneys' argument for the relevance of civil suits could cut both ways. Some defense counsel might argue that an accuser's filing of a civil suit indicates bias, but defense counsel could just as plausibly argue that the *failure* to file a civil suit undermines the accuser's credibility.[251] After all, the standards of proof are much lower in civil trials than in criminal trials. Defense counsel could suggest that the accuser's reluctance to file a civil claim acknowledges that the evidence is weak—too weak even for the lower standard of proof in civil court. The fact that evidence of parallel suits could support opposite inferences about the credibility of accusers casts further doubt on the probative value of this evidence.

The purpose of the foregoing discussion is not to suggest that evidence of accusers' parallel suits could *never* be relevant in criminal prosecutions. Rather, the purpose is to show that this relevance might be slight in many cases. The crucial question is not the relevance of the evidence when considered in a vacuum, but rather the relevance of the evidence in relation to its prejudicial effect. This ratio, not the absolute amount of probative value, determines whether the evidence can withstand the balancing test in Rule 403. Accordingly, the analysis turns to the topic of prejudice.

2. *Prejudice Disproportionate to Probative Value.* Rule 403 excludes evidence that would result in prejudice, confusion, or waste of time that would substantially outweigh the probative value of the evidence.[252] In addition to Rule 403, most evidence codes include other rules that guide judges in evaluating the interrelationship of

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251. *See, e.g.*, State v. Sexsmith, 57 P.2d 1249, 1251 (Wash. 1936) (recounting that during the prosecution, "appellant offered to prove that the witness had consulted different lawyers with the view of starting a civil action against appellant based upon the transaction which is the subject-matter of this [criminal case], and that no such suit was ever brought").

252. FED. R. EVID. 403.

probative value and prejudice with respect to particular categories of evidence.[253] No such rule exists in either the federal or state evidence codes identifying the potential harmful effect of evidence relating to an accuser's parallel civil litigation. The following discussion lists possible deleterious effects of admitting this evidence in a criminal trial.

To begin with, evidence of a parallel rape suit inflames jurors' prejudice against the accuser. Jurors instinctively distrust accusers in rape cases,[254] and jurors search for a "reason to doubt the allegation."[255] A civil suit provides that reason.[256] Because of a psychological phenomenon that might be termed the ulteriority heuristic, jurors attempt to make sense of perplexing facts by resorting to a familiar explanation: people lie to advance their hidden selfish motives, especially greed. Jurors strain to comprehend the seemingly irrational behavior at issue on the day of the charged offense, and they find the story easier to assimilate when they perceive it as a ruse contrived by a rational, deceptive accuser for self-enrichment.[257] Research indicates that anger is a stronger motivator

253. *See infra* Part IV.A.

254. VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 102-197, at 47 (1991) ("41 percent of judges surveyed believed that juries give sexual assault victims less credibility then [*sic*] other crime victims." (citing COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, GENDER & JUSTICE IN THE COLORADO COURTS 91 (1990))); *see also* Carney, *supra* note 143, at 346 ("[S]tudies of jury behavior and attitude reveal poorly disguised hostility toward rape victims . . . .").

255. *See* Long, *supra* note 221, at 12 ("When a victim alleges a domestic or sexual assault, the prevalence of myths surrounding domestic and sexual violence causes the public to search for a reason to doubt the allegation rather than to search for the truth."); Torrey, *supra* note 86, at 1050 ("While cognitive structures allow individuals to learn new information, they tend to perpetuate themselves by screening out information that is inconsistent with what is already believed. Cognitive inflexibility is what prosecutors face in trying to convict rapists when jurors have cognitive structures based on rape myths.").

256. Jurors are more uncomfortable with civil suits for rape than with civil suits alleging other nonsexual crimes. *See* Dickerson, *supra* note 26 ("Although the public has little difficulty appreciating an ordinary assault victim's desire for restitution, some jurors are more suspicious when a rape victim brings all her legal remedies to bear.").

257. *See* Barrett, *supra* note 73 ("Jurors are suspicious of plaintiffs. Underlying this suspicion is the bias that the plaintiff has an ulterior motive, usually money, for bringing the case . . . ."); Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 439, 461 (2006) (discussing jurors' susceptibility to a defense strategy portraying the accuser as an "unstable money-grubber" and further asserting that jurors are prone to regard accusers in rape prosecutions as "gold-digging" and "hoping to seek damages in a subsequent civil suit, especially if the defendant is wealthy"); *see also* Torrey, *supra* note 86, at 1051 (surveying psychological research to show that jurors feel

for jurors than sympathy, and accusers often bear the brunt of that anger.[258] Moreover, the cognitive structure of availability bias leads jurors to favor readily available evidence (details of accusers' civil suits) over less available evidence (details concerning the sexual misconduct alleged by the prosecution).[259] Jurors may find it easier to "try the victim" and focus on the victim's apparent avarice rather than on the alleged misconduct of the accused.[260] As with evidence of accusers' prior sexual history,[261] evidence of accusers' civil lawsuits becomes such a distraction that it may thwart the prosecution for reasons unrelated to the defendant's guilt or innocence.

Evidence of parallel civil litigation can actually prejudice the *defendant* as well as the accuser. One problem is that this evidence draws attention to the wealth or poverty of the defendant.[262] Once jurors hear about a lawsuit, they might assume that the accused has the wealth to make such a suit worthwhile—an assumption that could engender prejudice against the accuser among jurors with an antielitist inclination. A prosecutor may counter the "gold digger" hypothesis by offering evidence of the defendant's poverty or the

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a need to posit a "just world," and so they grasp at explanations that do not require them to ponder human capacity for such depraved crimes as rape).

258. Elizabeth F. Kuniholm, *Representing the Victim of Sexual Assault and Abuse: Special Considerations and Issues*, *in* 2 ATLA ANNUAL CONFERENCE REFERENCE MATERIALS, *supra* note 73, at 1889, 1889 (summarizing research on jurors' cognitive phenomena that come into play during rape trial).

259. *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11 (Daniel Kahneman et al. eds., 1982) (suggesting that "people assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind"); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208 (1973) ("[A] person could estimate . . . the likelihood of an event . . . by assessing the ease with which the relevant mental operation of retrieval, construction, or association can be carried out."); Kuniholm, *supra* note 258 ("Recent juror bias research has strongly supported the notion that jurors react to evidence by focusing on the most available evidence to the exclusion of less available evidence. In other words, people tend to criticize and judge most harshly that which they are most familiar with." (internal quotations and citations omitted)).

260. *See* John Q. La Fond & Bruce J. Winick, *Foreword: Sex Offenders and the Law*, 4 PSYCHOL. PUB. POL'Y & L. 3, 17 (1998) (discussing defense strategy of "try[ing] the victim" in rape cases).

261. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 158–159 (2002) (indicating that the exclusion of the accuser's prior sexual history is necessary to prevent prejudice and ensure truth-seeking in rape prosecutions).

262. *See, e.g.*, Harkins v. United States, 810 A.2d 895, 898 (D.C. 2002) (in a prosecution for sexual abuse, noting that an examination of the accuser about her alleged interest in filing a civil suit raised the issue that the defendant "might be wealthy").

accuser's wealth. Courts allow this evidence because the impeachment concerning the civil litigation opened the door.[263] Of course, evidence of the defendant's poverty can be highly prejudicial.[264] The risk that jurors' preoccupation with wealth or poverty will distract them from the particular facts of a case is a significant one, and it far outweighs the negligible probative value of impeachment concerning parallel suits.[265]

Yet another risk is the inference that the civil claim has merit—especially if the jury learns that the claim has settled.[266] As long as civil suits are fair game for impeachment, some authority suggests that the government may put evidence of accusers' civil settlements in the record during the prosecution's case-in-chief, because a party may generally lead off with impeachment of its own witness to blunt the impact of this evidence.[267] The accused suffers significant prejudice

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263. *See, e.g.*, McLaughlin v. Renico, No. 04-CV-74268-DT, 2006 WL 3313755, at *9–10 (E.D. Mich. Nov. 13, 2006) (reporting that "the prosecutor ask[ed] about [the defendant's] lack of income and resources and argued in his closing that the victim was not bringing this rape allegation to make money by suing" the defendant); People v. McLaughlin, 672 N.W.2d 860, 878 (Mich. Ct. App. 2003) (holding, in the same rape prosecution case, that the prosecutor's questions about defendant's poverty was permissible because "it related to defendant's argument that the victim falsely accused him" to make money in a civil lawsuit and so the prosecution reasonably "challenged this argument by eliminating all likely motives to bring a false rape charge, including the absence of a financial motive to falsely accuse the defendant").

264. In a criminal prosecution, evidence of the defendant's poverty is highly prejudicial, because it poses "a risk that it will cause jurors to view a defendant as a 'bad man'—a poor provider, a worthless individual." People v. Henderson, 289 N.W.2d 376, 381 (1980); *see also* Hideaki Sano, *Evidence*, 51 WAYNE L. REV. 779, 793 (2003) (urging that courts should exclude evidence of poverty even when defense impeachment raises question about accuser's motive).

265. Evidence of relative wealth and poverty could cause prejudice to the prosecution as well as the defense. A defendant might mention civil litigation as a means of signaling to the jury that the defendant is wealthy and the accuser lacks resources—a fact that could foment class prejudice in the jury. *See* State v. Merrick, No. 22885-1-III, 2005 WL 3048027, at *5 (Wash. Ct. App. Nov. 15, 2005) (holding, in a rape prosecution, that the trial court properly limited defense questions concerning the prosecution's witness's alleged financial desperation because this questioning might have yielded confusing and prejudicial evidence).

266. *See, e.g.*, State v. Davis, No. E2003-02162-CCA-R3-CD, 2004 WL 2378251, at *4 (Tenn. Crim. App. Oct. 25, 2004) (noting that, during the cross-examination of the defendant in a rape case, the prosecution established that "he had lost all of his possessions due to a civil suit brought by the victim's parents").

267. *See, e.g.*, State v. Zack, Nos. 99CA007321, 99CA007270, 2000 WL 763329, at *7–8 (Ohio Ct. App. June 14, 2000) (upholding a conviction for sexual abuse even though the government introduced the fact of the accusers' civil settlements with the city and concluding that "the prosecutor examined [the accusers] about their civil settlements . . . in order to reveal their potential biases regarding having a financial motivation to accuse [the defendant] of improper conduct"). *See generally* FED. R. EVID. 607 (allowing any party to impeach the credibility of a witness); MUELLER & KIRKPATRICK, *supra* note 211, at 468 ("On direct, the

when the jury in a criminal case learns of a civil settlement that seems to confirm the accusers' account of the facts at issue in the prosecution.[268] Indeed, the general rule allowing evidence of parallel civil suits bolsters the prosecution when the suits have settled before the criminal trials.[269]

Special concerns arise when the parallel civil litigation includes claims against third parties. Such third-party litigation might be prejudicial against the prosecution because it might create the mistaken impression that the accused has less culpability, as if liability were a zero-sum game.[270]

References to third-party litigation could also prejudice the accused. For example, many third-party suits allege negligent hiring of the alleged perpetrator. In such a suit, the plaintiff needs to show that the employee's unreliability was evident at the time of the hiring decision. The plaintiff frequently tries to meet this burden by introducing evidence of prior convictions of the employee, along with other evidence of the employee's past misconduct. The discussion of such facts in a criminal prosecution would be extremely prejudicial to

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proponent may bring out facts his adversary might later explore as indications of bias on the part of the witness. Otherwise the later attack takes on artificial meaning because it suggests not only that the witness is biased but that the proponent tried to hide it.").

268. *See, e.g.*, State v. Wilson, No. 57236-9-I, 2007 WL 2085333, at *2 (Wash. Ct. App. July 23, 2007) (noting, in a rape prosecution, that the accused actually moved to exclude any reference to the parallel civil suit that the accuser had settled with the landlord, because evidence of this suit would cause undue prejudice against the accused); *cf.* State v. Snyder, 104 N.E.2d 169, 171 (Ohio 1952) ("[T]he record of a judgment in a civil action is not admissible in a criminal prosecution to establish the facts essential to a conviction.").

269. Federal Rule of Evidence 408 and its state analogs, which generally protect parties from impeachment with evidence of settlement negotiations, *see* FED. R. EVID. 408; *see also, e.g.*, N.C. R. EVID. 408; OHIO R. EVID. 408, would be of no use to the accused in fending off evidence that the accuser has settled a civil claim involving the same facts that are at issue in the criminal prosecution. Rule 408 would be unavailing for two reasons. First, Rule 408 only covers settlement offers and settlement negotiations; it does not extend to consummated settlements. FED. R. EVID. 408(a). Second, Rule 408 only applies when the proponent of the evidence is seeking to show the liability of a settling party. FED. R. EVID. 408(b). Thus, the prosecution could claim that it is offering the evidence to show the bias of a witness, not to show the guilt of the accused. *See, e.g.*, *Zack*, 2000 WL 763329, at *7–8 (accepting such an argument by the prosecution); 98 C.J.S. *Witnesses* § 654 (2007) ("Rules of evidence pertaining to the admissibility of compromises and offers to compromise, do not require the exclusion of evidence of a settlement between a witness and a party if such evidence is used to show bias or prejudice rather than liability.").

270. *See* Palermo v. State, 992 S.W.2d 691, 698 (Tex. App. 1999) (noting that, as a general matter, the accused should not be able to reduce his criminal liability by pointing to the possible civil liability of third parties).

the defendant[271]—especially when the rules of evidence would otherwise exclude this information.

Most of the foregoing discussion has focused on the risk that evidence could lead the jury to favor or disfavor a party. There is another important risk to consider: the potential to confuse the jury. Confusion is a ground for excluding evidence.[272] There are several aspects of introduction of evidence of civil litigation could be confusing for juries in criminal cases. First, civil actions have different standards of proof, and a party may want to point out this difference if it serves the party's interest. The multiplicity of standards could befuddle juries as they attempt to weigh evidence in the criminal prosecution. Moreover, parallel civil suits often involve complicated theories such as strict liability, respondeat superior, comparative fault, and other confusing concepts.[273] The accused may discuss the doctrines of collateral estoppel or issue preclusion to show the civil claimant's bias to favor a guilty verdict. Parties in a criminal prosecution may also want to address the merits of a parallel civil claim, because this discussion could shed light on whether the claim is an opportunistic ploy or a righteous cause. Exploring the merits of the civil case by interrogating accusers could be very difficult because accusers may not fully understand the theories in the civil case.[274] For all these reasons, a detailed discussion of civil claims could lead to a confusing minitrial during the criminal trial.[275]

In sum, evidence of parallel civil litigation is a wild card that could cause significant prejudice and confusion. The evidence could jeopardize the interests of both the government and the accused.

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271. *See* Kraus v. Commonwealth, No. 2004-CA-000183-MR, 2005 WL 790778, at *5 (Ky. Ct. App. Dec. 14, 2005) (holding, in the prosecution of an alleged rape by an employee of a taxi service, that the trial court properly excluded evidence of the accuser's civil suit against the taxi service for negligent hiring).

272. *See* FED. R. EVID. 403. The state analogs to FED. R. EVID. 403 also permitted exclusion of relevant evidence on the grounds of confusion. *E.g.*, N.C. R. EVID. 403; OHIO R. EVID. 403.

273. *See, e.g.*, *Wilson*, 2007 WL 2085333, at *3 (agreeing with the trial court that the probative value of evidence concerning a third-party civil suit was "exceedingly outweighed by the risk of confusion of the issues" and was "an incredible waste of time [because] the State would be entitled to, in essence, litigate the merits" of the civil suit).

274. Child witnesses would have special difficulty with the cross-examination. For an excellent treatment of the challenges that arise during the cross-examination of accusers in child abuse cases, see generally Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 IND. L.J. 1029 (2007).

275. *See, e.g.*, *Wilson*, 2007 WL 2085333, at *3 (upholding a rape conviction after trial court excluded a third-party civil suit to avoid retrial of civil claims).

Although prejudice and confusion do not outweigh probative value in every case, the imbalance frequently favors exclusion—especially when one considers that the probative value of this evidence is often negligible.

3. *Hindrance of the Civil Remedial System.* In evaluating the admissibility of evidence, the primary focus is the foreseeable effect of the evidence on the proceedings at hand. But policymakers also take account of externalities: the effect of evidentiary rulings on the world outside of the particular trial in question.

The current rule permitting impeachment based on accusers' civil suits may pressure some rape survivors to forego civil litigation. Survivors who follow the news see that civil claimants face tremendous embarrassment when they take the stand in criminal trials. For example, Kobe Bryant's and Mike Tyson's accusers endured a firestorm of criticism for their "greedy" motives.[276] This opprobrium not only causes anguish for the survivors, but it may also reduce the odds for a successful prosecution.[277] An accuser who believes that filing a civil claim might help a rapist to escape punishment would understandably feel reluctant to sue. According to one commentator, "[m]any rape victims . . . conclude that forswearing any interest in civil damages is the price they must pay to establish their own credibility" as accusers in criminal prosecutions.[278]

It is hard to quantify the extent to which the current impeachment rules discourage claimants from filing civil suits. The overall rate of civil litigation for rape is increasing.[279] Yet the proportion of rape survivors who file civil suits is still alarmingly low. One expert indicated that fewer than 10 percent of rape survivors file civil claims.[280] The reluctance of survivors to sue probably owes to a wide range of factors, but their vulnerability to impeachment based on civil litigation makes a difference.[281] Indeed, the incompatibility of

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276. *Appeals Court Grants Tyson Hearing on Legal Point*, JET, Jan. 10, 1994 ("Tyson's lawyers have claimed that Desiree Washington invented the rape story to get rich off the former heavyweight champion"); Johnson, *supra* note 33 (explaining how outcry over civil suit factored in demise of criminal prosecution).

277. *See supra* Part III.A.2.

278. Dickerson, *supra* note 26.

279. *See supra* Part I.A.

280. Frazier, *supra* note 47 (quoting the policy director for the National Center for Crime Victims).

281. Dickerson, *supra* note 26.

civil and criminal proceedings is common knowledge throughout the United States. The whole nation watched as the prosecution of Kobe Bryant fell apart shortly after his accuser filed a civil claim.[282]

Criminal and civil recourse should not be mutually exclusive for rape survivors. A criminal conviction is important because it incapacitates the offender, deters future offenses by others, and sends a message to society condemning sexual misconduct. Yet the civil system offers important complementary redress. The civil system extends accountability to parties who are beyond the reach of criminal prosecution because they lack the requisite mens rea (or, perhaps, because the prosecution cannot prove their guilt beyond a reasonable doubt). Civil litigation prompts third-party defendants to undertake proactive measures such as enhancing the security of buildings, improving background checks in hiring, strengthening oversight, and establishing better mechanisms for reporting sexual predators when they display early warnings of their tendencies. Arguably, such proactive measures are just as important as any retrospective justice.[283]

4. *Deterrence of Victims' Cooperation with Law Enforcement.* Faced with a Hobson's choice, rape survivors might favor civil remedies over criminal trials. After all, the civil justice system allows victims to take control of litigation, whereas victims are subordinate to prosecutors in the criminal justice system. The civil system affords fewer procedural rights to defendants. It offers a different range of remedies, including injunctive relief.[284] Of course, only the criminal system can incarcerate defendants, but this remedy may be of less interest to victims of acquaintance rape, who may believe that they can protect their safety in the future simply by avoiding their assailants.

As a general matter, victims' willingness to cooperate with law enforcement varies inversely with their fear of embarrassment during

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282. Johnson, *supra* note 33.

283. *See* EPSTEIN & LANGEBAHN, *supra* note 46, at 74 ("Civil suits have perhaps had their greatest impact by prompting third parties, such as employers and landlords, to take measures that will prevent criminal attacks on those to whom they owe a duty of care."); *cf.* Manley, *supra* note 88, at 204–11 (discussing cases in which third-party civil suits have been utilized to "adequately compensate[] [a rape victim] for her injuries").

284. For a list of the advantages that civil litigation offers over criminal prosecution, see *supra* Part I.B.

cross-examination.[285] The recognition of this phenomenon led to the passage of the first rape shield laws in the 1970s.[286] There is some evidence that victims' fear of testifying has increased since the 1990s. Data released by the U.S. Bureau of Justice Statistics in June 2005 indicate that victims' concerns about embarrassment in the criminal justice system have become a more significant deterrent to the reporting of violence against women.[287] Victims' advocates in particular areas of the country have noticed that an increasing number of rape victims who seek counseling do not report the rapes to police due to fears about testifying at trial.[288] In particular, the

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285. Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 936–37 (2001) (noting that a woman's decision to report sexual violence is influenced by the potential for "embarrassing questions . . . by defense attorneys in public about a victim's sexual history"); Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 12 EDUC. L. REP. 11, 23, 29–30 (2000) (observing that in college disciplinary hearings adjudicating allegations of date rape, the victims' willingness to file complaints depends on the extent of adversarial examination).

286. 23 ALAN WRIGHT & KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. EVID. § 5382 (2005) (analyzing the policy behind federal rape shield law, and noting the proponents' concern that rape victims who feared embarrassment at trial would not seek charges against their assailants); Christina C. Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 48–55 (2002) (reviewing the legislative history of the federal rape shield law).

287. Among women who declined to report violent crimes committed against them by intimates (defined as current and former spouses and boyfriends), the percentage citing privacy concerns has grown since the 1990s. A 1998 report indicated that 15.4 percent of nonreporting victims cited privacy concerns as the reason for their reluctance to file complaints against their assailants. A follow-up report in June 2005 indicated that 33.8 percent of nonreporting victims cited privacy concerns as their reason for not filing complaints against assailants who were boyfriends or girlfriends; 25.1 percent of nonreporting victims cited privacy concerns as their reason for not reporting violent crimes committed against them by spouses. *Compare* LAWRENCE A. GREENFIELD ET AL., U.S. BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 19 (1998) (setting forth data for the years 1992 through 1996), *with* MATTHEW R. DUROSE ET AL., U.S. BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS, INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 26 (2005) (setting forth data for the years 1998 through 2002).

288. Elaine D'Aurizio, *Kobe Bryant Rape Case Seen Having a Chilling Effect,* RECORD (Bergen County, N.J.), June 15, 2004, at A1 (faulting the Bryant case for "having a chilling effect" on the reporting of rape); Maestri & Goad, *supra* note 1 (noting that in Riverside, California, there was no decline in the number of rape victims seeking counseling, but the number of victims willing to press criminal charges did decline because of fears about the ordeal of trial); *CBS Evening News* (CBS television broadcast Jan. 23, 2004), *available at* http://www.cbsnews.com/sections/i_video/main500251.shtml?id=595566n, (noting that "rape hotline calls at the University of Northern Colorado, where Bryant's accuser was a freshman, dropped 25 percent after the case broke" and suggesting that the drop reflected victims' unwillingness to report sexual assaults, not a drop in actual assaults).

vituperation that accusers endure when they file civil suits might lead many to give up their role as accusers and focus solely on the civil litigation.[289] Criminal prosecutions of rape become more difficult without the cooperation of the accusers, so accusers' withdrawals frequently result in dismissals of charges.[290]

Occasionally a trial court hearing a rape prosecution will exclude evidence of an accuser's civil suit because "sex-crime victims deserve special protection" from such impeachment "to encourage other victims to come forward."[291] Appellate courts may find this goal "well-intentioned," but will likely reverse the trial court because the rules of evidence do not presently provide a solid basis for excluding this evidence.[292]

In sum, there are at least four reasons to limit cross-examination of accusers based on their civil suits. First, this evidence has negligible relevance. Second, this evidence is highly likely to inflame the jury's prejudice against accusers. Third, the impeachment of rape survivors with evidence of civil suits might lead them to give up civil recourse. Finally, an accuser who refuses to give up civil remedies might very well attempt to withdraw from the criminal prosecution of the alleged assailant.

B. Reasons to Allow Impeachment with Evidence of Civil Claims

Notwithstanding arguments to limit impeachment of accusers with evidence of their parallel civil suits, there at least two reasons to

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289. *See* Maestri & Goad, *supra* note 1 (reporting that in Southern California, rape victims who saw Kobe Bryant's accuser excoriated for her civil suit would rather file civil claims without bothering with criminal prosecutions and that although there was no decline in the number of rape victims seeking counseling, the number of victims willing to press criminal charges did decline).

290. *See, e.g.*, Lininger, *supra* note 33, at 822–24 (citing a survey indicating an increase in dismissals of criminal prosecutions alleging violence against women because of heightened confrontation requirements and accusers' reluctance to testify); Johnson, *supra* note 33 (reporting a comment by the prosecutor that the accuser's reluctance to continue was reason for dismissal of rape charges against Kobe Bryant).

291. *See, e.g.*, People v. Griffin, 671 N.Y.S.2d 34, 36 (App. Div. 1998) (noting that the trial court, in a rape prosecution, excluded evidence of the accuser's parallel civil suit because the court wanted to minimize the hardship of cross-examination to encourage rape victims to file criminal complaints).

292. The 'rape shield law' has severely restricted impeachment of the victim by use of prior *sexual* history (with very carefully denied exceptions). But nothing in that law, or any other pertinent authority, provides a protective cocoon for alleged sex-crime victims against all other standard forms of impeachment, including those tending to show bias, hostility or monetary incentive to fabricate. *Id.* at 37.

be wary of an outright ban on such impeachment. First, the accused has a constitutional right to confront all accusers. Second, the risk of fraudulent rape accusations, however remote, necessitates that defense attorneys have some tools to expose deceitful accusers. This Section discusses each of these concerns in turn.

1. *Constitutional Requirement of Confrontation.* The Sixth Amendment's Confrontation Clause gives criminal defendants the right to confront their accusers. At the core of the confrontation right is the right to cross-examine the prosecution's witnesses.[293] The right to cross-examination serves two purposes. First, it has utilitarian value in testing the truthfulness of the government's witnesses and exposing reasons why the jury should doubt their testimony.[294] Second, and separate from its utilitarian value in a particular case, cross-examination is important for its own sake: it is a crucial aspect of fairness, and the court's willingness to allow cross-examination of the accuser respects the dignity of the accused.[295] Because cross-examination is much more than a device to detect truthfulness, a trial court generally cannot turn off the right of cross-examination when it seems expedient to do so.[296]

Among the various categories of cross-examination, questioning that probes bias is particularly important. The Supreme Court has construed the Confrontation Clause to require cross-examination of the complaining witnesses for the purpose of "revealing possible biases, prejudices, or ulterior motives . . . as they may relate directly to issues or personalities in the case at hand."[297] The Court has "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[298] The Court has declared that "a criminal

293. Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the [Confrontation Clause] hold that a primary interest secured by it is the right of cross-examination.").

294. Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

295. Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (equating cross-examination with inalienable rights such as the right to trial by jury and insisting that judges cannot dispense with the right to cross-examination simply because they think that the evidence in question is reliable).

296. *Id.*

297. *Davis*, 415 U.S. at 316.

298. *Id.*

defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."[299]

Proper proof of bias need not consist solely of illegal or immoral conduct by the witness. Parents may be biased witnesses in their child's trial for reasons of love and loyalty; although perfectly commendable, these reasons still warrant caution as jurors evaluate the credibility of a parent's testimony.[300] More germane for present purposes, when the defendant impeaches the accuser for filing a lawsuit against the defendant, that lawsuit need not be "wrong" to provide fodder for impeachment.[301] In other words, conduct need not be blameworthy to be impeachable for bias; the conduct must simply be relevant to bias.[302]

The right to impeach is not absolute, however. The Supreme Court has emphasized that the accused has no constitutional right to impeach with evidence of scant relevance.[303] The Court has approved "reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[304] Moreover, the Court has stressed that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[305] Lower courts have recognized the same principle in the specific context of rape prosecutions.[306]

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299. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

300. William G. Hale, *Bias as Affecting Credibility*, 1 HASTINGS L.J. 1, 1 (1949) ("The existence of bias does not necessarily imply conscious falsehood."). For example, the common membership of the witness and a party in an organization can give provide grounds for bias, whether or not the organization is engaged in illegal or immoral activities. United States v. Abel, 469 U.S. 45, 52–54 (1984).

301. Thus an answer of "no" to the question that frames this article—"Is it wrong to sue for rape?"—does not end the inquiry. A rape suit could be well-founded and still provide the basis for impeachment, at least in theory.

302. *See* FED. R. EVID. 401.

303. *Van Arsdall*, 475 U.S. at 679.

304. *Id.*

305. Delaware v Fensterer, 474 U.S. 15, 20 (1985) (per curiam).

306. *See, e.g.*, Savastano v. Hollis, Nos. 02-CV-3299(JBW), 03-MISC-0066(JBW), 2003 WL 22956949, at *16–17 (E.D.N.Y. Oct. 10, 2003) ("Trial judges have broad discretion to impose reasonable limits which means defense counsel are not the sole arbiters of what is necessary

Rule 412,[307] the federal rape shield statute which has repeatedly withstood constitutional review[308] since its amendment in 1994,[309] provides an example of a permissible limit on cross-examination.[310] The law reflects a judgment that in a rape prosecution, the prejudicial effect of an accuser's prior consensual sexual history generally outweighs the probative value of the evidence.[311] The rule rests in part on policy concerns about reducing the disincentives for reporting rape.[312] The rule does not wall off all inquiry about the accuser's sexual history, however. The defendant still may inquire about the accuser's sexual history (1) for proof of prior consensual acts involving the accused and the accuser, (2) for proof that another person was the source of the biological material or the cause of the bodily injury at issue in the prosecution, or (3) for any other purpose as required by the Constitution.[313] Courts and commentators reviewing the constitutionality of the rape shield law have lauded its

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cross-examination."); McCarthy v. State, 749 N.E.2d 528, 533 (Ind. 2001) (declaring, in a sex abuse prosecution, that the right of cross-examination is subject to "reasonable limitations"); State v. Quatrevingt, 670 So. 2d 197, 210 (La. 1996) (noting, in rape prosecution, that, notwithstanding constitutional requirement of confrontation, the trial court may properly limit examination of the accuser concerning the details of a parallel civil suit when the evidence at issue was prejudicial, confusing, and only marginally relevant); Hoover v. State, No. 03-05-0064-CR, 2007 WL 619500, at *3 (Tex. App. Feb. 27, 2007) (mem.) (holding, in a rape prosecution, that the trial court could exclude impeachment evidence offered for bias when "the degree of possible relevance of the evidence as presented [is] so low as to be within the 'zone of reasonable disagreement'"); State v. Wilson, No. 57236-9-I, 2007 WL 2085333, at *2–3 (Wash. Ct. App. July 23, 2007) (noting that, notwithstanding the Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), "[t]he trial court has discretion to admit or exclude evidence or limit cross-examination regarding bias where the circumstances only remotely show bias or where the evidence is vague or merely argumentative or speculative").

307. FED. R. EVID. 412.

308. *See, e.g.*, United States v. Hitt, 473 F.3d 146, 157 (5th Cir. 2006) (agreeing with "[o]ther circuits [that] have held that evidence of prior sex acts of alleged victims of a sexual assault can be excluded without violating the Sixth Amendment").

309. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 tit. IV, § 40141, 108 Stat 1796, 1918–19 (codified at 28 U.S.C. § 2074 note (2000)).

310. *See* FED. R. EVID. 412 (generally prohibiting evidence of the alleged victim's prior sexual behavior or "sexual predisposition" but admitting this evidence in limited circumstances).

311. *See* 124 CONG. REC. H11,944 (1978) (statement of Rep. Mann), *reprinted in* FEDERAL RULES OF EVIDENCE 66 (West 2007) ("Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted intrusion into her private life.").

312. *See* FED. R. EVID. 412 advisory committee's note ("By affording victims protection in most instances, the rule . . . encourages victims of sexual assault to institute and to participate in legal proceedings against alleged offenders.").

313. *See* FED. R. EVID. 412(b) (defining these exceptions to Rule 412's general prohibition of sexual history evidence).

purposes and concluded that its exceptions guarantee against violations of defendants' constitutional rights.[314]

Courts that scrutinize the constitutionality of limits on cross-examination have shown particular concern about one question: does the limitation prohibit all cross-examination on a subject, or does it simply set parameters for cross-examination on that subject? In August 2007, the *en banc* Ninth Circuit considered this dichotomy in determining the appropriate standard of review for limits on defendants' cross-examinations.[315] The court held that if a trial court excludes examination into an area of inquiry, the court applies de novo review. If the trial court limits the scope of an examination but permits some inquiry into the topic, then the appellate court applies the abuse of discretion standard.[316] The Ninth Circuit relied on *Delaware v. Van Arsdall*,[317] in which the Supreme Court held that although trial courts have "wide latitude . . . to impose reasonable limits" on cross-examination,[318] the Confrontation Clause protects the defendant's opportunity to cross-examine.[319] Other courts have followed the Court's distinction and applied heightened review to limitations on the defendant's constitutional opportunity to cross-examine.[320]

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314. For a constitutional analysis of the rape shield laws, see Anderson, *supra* note 261, at 153–61 (proposing a new rape shield law and arguing that it passes Confrontation Clause scrutiny), and J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 589–90 (1980) (arguing that, because rape shield laws may not exclude evidence for which probativity outweighs prejudice, laws containing absolute prohibitions on sexual history evidence are unconstitutional). For an interesting proposal to reform rape shield laws so that they exclude evidence of accusers' prior prostitution, see Karin S. Portlock, Note, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1407–08 (2007).

315. United States v. Larson, 495 F.3d 1094, 1100 (9th Cir. 2007) (en banc), *petition for cert. filed* (U.S. Oct. 29, 2007) (No. 07-7481).

316. *Id.* at 1101.

317. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

318. *Id.* at 679.

319. *Id.* at 678–79.

320. *See* United States v. Holt, 486 F.3d 997, 1000–01 (7th Cir. 2007) (reviewing limitations on cross-examination's scope for abuse of discretion, but reviewing de novo when "confrontation is directly implicated"); United States v. Kenyon, 481 F.3d 1054, 1063 (8th Cir. 2007) (same); United States v. Martínez-Vives, 475 F.3d 48, 53 (1st Cir. 2007) ("[W]e first perform *de novo* review to determine whether a defendant 'was afforded a reasonable opportunity to impeach adverse witnesses' . . . . Provided that threshold is reached, we then review the particular limitations only for abuse of discretion." (quoting United States v. Callipari, 368 F.3d 22, 36 (1st Cir. 2004))); United States v. Hitt, 473 F.3d 146, 155–56 (5th Cir. 2006) (reviewing limits on cross-examination for abuse of discretion unless they curtail

The foregoing constitutional authority guides the formulation of the policy proposals in this Article. Three lessons are particularly noteworthy. First, the constitutional protection of cross-examination depends upon the proper ratio of probative value to prejudice.[321] Second, constitutional jurisprudence can legitimately incorporate policy concerns about protecting accusers from undue harassment.[322] Third, an unconditional ban on impeachment concerning a particular subject is less likely to pass constitutional muster than a more nuanced rule with exceptions for certain categories of permissible impeachment.[323]

Because the Confrontation Clause applies in criminal prosecutions but not in civil suits, it is important to bear in mind that the hardship of cross-examination in criminal cases could drive rape victims to pursue remedies solely in the civil system, where defendants would have diminished rights to cross-examine witnesses. Perhaps ironically, a policy proposal that restricts cross-examination somewhat in the criminal system may in the long run *protect* confrontation rights by avoiding the wholesale diversion of complainants from the criminal justice system to the civil system. To put it simply, the criminal trial is not the only game in town. Rape survivors will not play that game unless the rules are fair to the accuser as well as the accused.

2. *Need to Expose Fraudulent Accusations.* It is impossible to quantify the incidence of fraudulent rape accusations. Some commentators maintain that accusers in rape prosecutions are no more likely to trump up charges than are accusers in other categories of prosecutions.[324] One expert has indicated that the percentage of

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confrontation, in which case they are reviewed de novo); *see also* United States v. Crockett, 435 F.3d 1305, 1311 (10th Cir. 2006) (laying out similarly dichotomous standards of review, but ruling that the defendant had not preserved the issue for appeal).

321. *See* Robinson, *supra* note 143, at 352 ("Our criminal justice system's exclusionary and relevance rules demonstrate that '[i]t is beyond dispute that a criminal defendant has no constitutional right to present irrelevant, prejudicial evidence in his or her behalf.'" (quoting Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 806 (1986))).

322. *See supra* notes 303–06 and accompanying text.

323. *See supra* notes 315–20 and accompanying text.

324. Professor Susan Estrich of the University of Southern California Gould School of Law, a rape victim herself, has little patience for the myth that women routinely make up accusations of rape. "Do women lie about rape? Occasionally, but no study has ever found that women lie about rape any more often than men lie about other crimes. Why would they, given the stigma

deliberately false rape accusations may be approximately 2 percent of the total accusations.[325] Yet the growing damage awards may create temptations for some claimants to falsify charges in the hope of negotiating a lucrative settlement.

The rules governing admissibility of impeachment evidence concerning accusers' civil suits should never become so restrictive that they prevent defendants from ferreting out fraudulent accusations. A few recent stories give pause to reformers who would assume that all rape accusations are reliable.

In 2007, Michael Flatley, the Irish dancer who founded Riverdance, won a multimillion dollar tort judgment against a woman who had sued him for rape.[326] The accuser spent a night with Flatley in a hotel room; the following morning, in the presence of a witness, she appeared "relaxed and happy."[327] Her lawyer served Flatley with a settlement demand a few months after the encounter in the hotel room.[328] The lawyer threatened that the woman would accuse Flatley of rape unless Flatley paid for her silence.[329]

Also in 2007, a police officer in Texas faced a charge of rape.[330] The prosecution withheld evidence from the defendant indicating that the accuser had boasted to others before the trial that the accuser was "a good liar" and was "going to lie through my teeth . . . to get a lot money."[331] The court concluded that the withholding of this evidence amounted to a *Brady* violation, necessitating a new trial for the defendant.[332]

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that is still attached to victims, and the humiliation involved in pursuing a complaint?" Susan Estrich, *Why Would Accuser in Duke Rape Case Lie?*, FOXNEWS.COM, Apr. 23, 2006, http://www.foxnews.com/story/0,2933,192763,00.html.

325. Torrey, *supra* note 86, at 1028 ("In fact, there is no empirical data to prove that there are more false charges of rape than of any other violent crime. Estimates indicate that only 2 percent of all rape reports prove to be false, a rate comparable to the false report rate for other crimes.").

326. Debra Cassens Weiss, *Michael Flatley Awarded $11M for False Rape Accusation*, A.B.A. J. – L. NEWS NOW, Dec. 11, 2007, http://www.abajournal.com/news/michael_flatley_awarded_11m_for_false_rape_accusation.

327. Flatley v. Mauro, 139 P.3d 2, 6 (Cal. 2006).

328. *Id.*

329. *Id.* at 7–9.

330. United States v. Gutierrez, No. SA-05-CR-639-XR, 2007 WL 3026609, at *1 (W.D. Tex. Oct. 16, 2007).

331. *Id.* at *2 (omission in original).

332. *Id.* at *9.

The risk of fraudulent rape accusations—albeit a remote one—warrants some caution in the formulation of an evidentiary rule governing the admissibility of impeachment concerning the accusers' parallel civil suits. Courts should admit such evidence when the defendant can make a credible threshold showing of a scheme or artifice by the accuser (e.g., past filing of fraudulent claims or comments to friends about fraudulent intent in the present case). On the other hand, without the slightest indication of a fraudulent scheme, the defense should not be able to impeach with evidence of parallel civil suits.

IV. PROPOSED REFORMS

A comprehensive approach to the problems addressed in this Article requires two categories of reforms. First, it is necessary to revise the evidence rules to ensure that courts do not admit unduly prejudicial evidence about accusers' parallel civil suits.[333] Second, a number of ancillary reforms would help to minimize the overall friction between the civil and criminal justice systems.[334]

A. Amendment of Evidence Codes

Federal and state evidence codes currently include many provisions that limit the admissibility of impeachment evidence. These rules address several categories of evidence: (1) evidence of prior convictions,[335] (2) evidence of prior unconvicted conduct indicating untruthfulness,[336] (3) evidence of religious beliefs,[337] (4) evidence of prior inconsistent statements,[338] (5) evidence of settlement offers and negotiations,[339] (6) evidence of prior sexual history,[340] and (7) evidence of offers to pay medical bills.[341] Each of these categories

333. *See infra* Part IV.A.

334. *See infra* Part IV.B.

335. *E.g.*, FED. R. EVID. 609; N.C. R. EVID. 609; OHIO R. EVID. 609. These state rules are merely examples; each federal rule has many state counterparts. WRIGHT & GRAHAM, *supra* note 245, § 5009.

336. *E.g.*, FED. R. EVID. 608; N.C. R. EVID. 608; OHIO R. EVID. 608.

337. *E.g.*, FED. R. EVID. 610; N.C. R. EVID. 610; OHIO R. EVID. 610.

338. *E.g.*, FED. R. EVID. 613; N.C. R. EVID. 613; OHIO R. EVID. 613.

339. *E.g.*, FED. R. EVID. 408; FED. R. EVID. 410; N.C. R. EVID. 408; N.C. R. EVID. 410; OHIO R. EVID. 408 (civil); OHIO R. EVID. 410 (criminal).

340. *E.g.*, FED. R. EVID. 412; N.C. R. EVID. 412; TENN. R. EVID. 412. The Ohio Evidence Rules do not include a counterpart to Federal Rule 412.

341. *E.g.*, FED. R. EVID. 409; N.C. R. EVID. 409; OHIO R. EVID. 409.

of evidence poses a special risk that prejudice might exceed probative value or that admission of the evidence might discourage socially useful conduct out of court.

Evidence of an accuser's civil suit is similar to these categories of evidence. The great risk of prejudice, the sometimes dubious probative value, and the need to incentivize socially useful conduct—all these considerations militate in favor of establishing a new evidence rule for impeachment of an accuser based on civil claims. Such a rule would promote greater uniformity in court rulings, enhance the predictability of outcomes, and help to promote a complementary relationship between criminal and civil litigation in rape cases.

1. *Specific Rule Governing Impeachment with Parallel Civil Claims.* Appendix A sets forth a proposed rule of evidence that would govern impeachment of accusers with evidence of their parallel civil litigation. Rather than admitting such evidence automatically or excluding it altogether, the new rule would rely on a balancing test to sort admissible from inadmissible evidence. The rule would require that the proponent of the evidence must show that probative value exceeds prejudicial effect—a balancing test that is stricter than the default test under Rule 403,[342] but less exacting than some tests used elsewhere in the impeachment rules.[343] The proponent would need to offer specific facts and circumstances supporting admissibility.[344]

The new rule occasionally would allow impeachment with reference to the fact of civil litigation, but the rule would not allow the impeaching attorney to refer to the amount of damages sought in the civil suit. This restriction is a per se judgment that the prejudicial effect of admitting the plaintiff's prayer for damages would far exceed the probative value of this evidence. Some trial courts have allowed

342. Federal Rule of Evidence 403 and its state counterparts require the exclusion of evidence when the probative value of the evidence is substantially outweighed by the risk of prejudice, confusion of the jury, or waste of time. FED. R. EVID. 403; *e.g.*, N.C. R. EVID. 403, OHIO R. EVID. 403. In other words, if the deleterious and beneficial aspects of the evidence are close to equipoise, Rule 403 would not bar admission.

343. Federal Rule of Evidence 609(b) and its state counterparts require parties impeaching a witness with a conviction more than ten years old to show that the probative value of the conviction substantially outweighs its prejudicial effect. FED. R. EVID. 609(b); *e.g.*, N.C. R. EVID. 609(b), OHIO R. EVID. 609(b). Federal Rule 703 imposes a similar requirement to introduce facts and data underlying an expert opinion. *See* FED. R. EVID. 703 (admitting the evidence if its probativity substantially outweighs its prejudice).

344. For a nonexhaustive list of acceptable facts, see *infra* Part IV.A.2.

defense counsel to mention the actual dollar figure sought by the plaintiff,[345] but this evidence lacks much probative value beyond the mere fact of civil litigation.[346] Plaintiffs often exaggerate damages in complaints just to be cautious,[347] and the dollar figures in the complaints are not evidence.[348] These dollar figures—often in the millions—could be highly inflammatory if made known to juries in criminal prosecutions.[349]

The proposed rule would also prohibit the admission of pleadings and other paperwork from the accuser's civil action. These documents, filled with legalese, would offer little probative value beyond that which the descriptions of the litigation could convey.[350]

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345. *E.g.*, State v. Quatrevingt, 670 So. 2d 197, 210 (La. 1996) (indicating that, in a rape and murder prosecution, the trial court admitted evidence that the victim's father was seeking $1.6 million in civil damages); State v. Neese, No. M2005-00752-CCA-R3-CD, 2006 WL 3831387, at *4–5 (Tenn. Crim. App. Dec. 15, 2006) (noting that the defendant, in a rape prosecution, introduced evidence that the alleged victim's family had filed a lawsuit seeking $2 million); State v. Nelson, No. 31414-2-II, 2005 WL 2363803, at *1 (Wash. Ct. App. Sept. 27, 2005) (recounting that, in a prison rape prosecution, the trial court admitted evidence of the accuser's $5 million claim against the county).

346. As one court noted, "evidence of the dollar amount of damages the victim was seeking had little probative value. It is the existence of the pending lawsuit, not the amount of damages, that is material. The victim's motive to lie did not increase in direct proportion to the amount of damages sought." People v. Shiu, No. F035213, 2001 WL 1571464, at *13 (Cal. Ct. App. Dec. 10, 2001); *see also* Koo v. State, 640 N.E.2d 95, 102 (Ind. Ct. App. 1994) (holding, in a rape prosecution, that the amount of damages sought in the accuser's parallel civil suit was "unlikely to affect the jury's verdict").

347. *See, e.g.*, *Koo*, 640 N.E.2d at 102–03 (holding, in a rape prosecution, that the trial court properly excluded the amount of damages because "the prayer for damages is frequently exaggerated").

348. *See, e.g.*, Merzbacher v. State, 697 A.2d 432, 444 (Md. 1997) ("[F]igures contained in *ad damnum* clauses often mean very little.").

349. *See, e.g.*, *Shiu*, 2001 WL 1571464, at *13 (upholding the trial court's decision to allow impeachment of the accuser regarding the fact of a parallel civil suit but not the amount of damages requested, $2.1 million, because of the figure's potentially inflammatory nature); *Merzbacher*, 697 A.2d at 443–44 (affirming the defendant's conviction for sex abuse when the trial court allowed some cross-examination about the accuser's civil claim but excluded the precise dollar figure in the complaint's *ad damnum* clause as too prejudicial).

350. *See Quatrevingt*, 670 So. 2d at 210 (holding, in a prosecution for rape and murder, that the trial court properly excluded the details of the parallel civil suit); Bigby v. State, 892 S.W.2d 864, 887 (Tex. Crim. App. 1994) (upholding the defendant's conviction after the trial court allowed defense counsel to question the accuser about a parallel civil suit but did not allow that suit's pleadings to be introduced); Gallardo v. State, No. 01-95-01306-CR, 1998 WL 767633, at *3 (Tex. App. Nov. 3, 1998) (holding, in a rape prosecution, that the trial court may properly "prohibit questions which delve into the intricate details of a civil suit"); *see also* Hoover v. State, No. 03-05-00641-CR, 2007 WL 619500, at *4 (Tex. App. Feb. 27, 2007) (mem.) (finding no error when the trial court admitted testimony concerning the alleged victim's financial interest in the rape prosecution but excluded paperwork relating to her claim).

Moreover, the pleadings could confuse the jury.[351] Because of the psychological phenomenon known as "availability bias,"[352] there is a risk that jurors would emphasize the pleadings heavily in their deliberations because the pleadings would be readily accessible in the jury room, while jurors would lack transcripts or other paperwork memorializing other evidence they heard in the trial.[353] The pleadings in the civil proceeding are hearsay when offered for their truth in the criminal prosecution;[354] they are not admissions by a party-opponent because the accuser is not a party to the criminal proceeding.[355]

The proposed rule carves out three exceptions that allow the admission of evidence concerning the accuser's civil claims. First, this evidence is admissible when offered to show that the witness has made prior inconsistent statements in the civil case.[356] Second, the evidence is admissible if the government is prosecuting the witness for an offense relating to abuse of the judicial process (e.g., for making a false accusation to extort money from the defendant).[357] Third, as in the case of the rape shield law, the evidence is admissible if exclusion would violate the constitutional rights of the accused.[358]

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351. *See Quatrevingt*, 670 So. 2d at 210 (noting that introducing the details of a parallel civil suit into a prosecution for rape and murder could have "confused the jury and wasted the court's time").

352. *See supra* note 259 and accompanying text.

353. This very concern is the reason why other evidence rules generally exclude certain documents used in the examination of witnesses. *See, e.g.*, FED. R. EVID. 612 (preventing the proponent from entering into evidence a document used under the present recollection refreshed rule, although the opponent may do so); FED. R. EVID. 803(5) (same for a document used under the past recorded recollection rule); FED. R. EVID. 803(18) (allowing a learned treatise to be read the jury but not admitted into evidence).

354. *See* FED. R. EVID. 801. If offered to reveal the accuser's inconsistent statements rather than for the truth of the matters asserted, the pleading would not be hearsay. *See* FED. R. EVID. 801(c) & (d). The proposed rule would allow the use of pleadings for this purpose. *See infra* Appendix A: Proposed Rule 416(b)(1).

355. *See* FED. R. EVID. 801(d)(2).

356. *See infra* Appendix A: Proposed Rule 416(b)(1); *see also* State v. Strich, 915 A.2d 891, 903 (Conn. App. Ct. 2007) (holding implicitly that an accused should be able to cross-examine his accuser concerning her statements in civil litigation if they are inconsistent with her statements in prosecution), *cert. denied*, 920 A.2d 310 (Conn. 2007), *cert. denied*, 128 S. Ct. 225 (2007).

357. *See infra* Appendix A: Proposed Rule 416(b)(2); *cf.* United States v. Reed, 715 F.2d 870, 872 (5th Cir. 1983) (upholding an extortion conviction when the alleged rape victim had tried to extort money from the accused in exchange for dropping the criminal complaint).

358. *See infra* Appendix A: Proposed Rule 416(b)(3); *see also* FED. R. EVID. 412 (containing the same exception).

The new rule includes procedural requirements that reduce the risk of surprise and provide a fair opportunity for all sides to challenge the admissibility of the evidence.[359] The rule requires the proponent of the evidence to provide notice two weeks before trial or at a later time for good cause shown. The rule calls for an in camera hearing so that the parties can raise their concerns about the admissibility of the evidence outside the presence of the jury.

The new rule would very likely pass muster under the Confrontation Clause. This rule is certainly less restrictive than the rape shield law because it sets forth a balancing test in lieu of the blanket exclusion in the rape shield law.[360] The new rule does not put the entire topic of civil suits off limits for discussion, which would trigger the highest level of review under the Confrontation Clause; rather, it sets parameters for the permissible scope of discussion on this topic.[361] In any event, the new rule borrows language from the rape shield law that relaxes the rule to the extent necessary to meet constitutional requirements, so it would survive a facial challenge.[362]

2. *Commentary Guiding the Interpretation of the New Rule.* The Advisory Committee's notes are an important source of authority for judges interpreting the Federal Rules of Evidence. These notes do not have the same force as the rules themselves, but the Supreme Court and a number of federal courts have recognized that the notes are "instructive"[363] and "of weight."[364] It is particularly important for the notes to guide judges in their application of the evidentiary rules

359. *See infra* Appendix A: Proposed Rule 416(c). For analogous requirements, see FED. R. EVID. 412 (requiring fourteen days' notice of intent to use specific evidence of the accuser's prior sexual history), FED. R. EVID. 413 (requiring fifteen days' notice of intent to use specific evidence of prior sexual assaults committed by the accused), and FED. R. EVID. 414 (requiring fifteen days' notice of intent to use specific evidence of prior child molestation committed by the accused).

360. Federal Rule 412 flatly prohibits evidence of the accuser's sexual history that falls outside of the exceptions set forth in subsection (b). *See* FED. R. EVID. 412(a).

361. *See supra* Part III.B.

362. *See* Anderson, *supra* note 261, at 153–61 (arguing that her proposed New Rape Shield Law, which has no catch-all constitutional exception, is constitutional).

363. Moody Nat'l Bank v. GE Life & Annuity Assurance Co., 383 F.3d 249, 253 (5th Cir. 2004).

364. Torres v. Oakland Scavenger Co., 487 U.S. 312, 316 (1988) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444 (1946)).

governing rape cases,[365] lest judges resort to the same instinctive biases that the rules seek to correct.[366]

Every jurisdiction that adopts the new rule proposed in this Article should include application notes that identify particular considerations relevant to the balancing test for evidence of parallel civil suits. The following facts militate in favor of allowing this impeachment: (1) evidence that the accuser contacted a civil attorney before contacting law enforcement authorities,[367] (2) evidence of a significant time lapse between the alleged offense and the filing of a criminal complaint,[368] (3) evidence that the accuser delayed filing a criminal complaint until learning that the accused had significant assets or was otherwise vulnerable to a civil suit,[369] (4) evidence that the accuser sought compensation from the accused before filing the criminal complaint,[370] (5) evidence that the accuser took an inconsistent position on a material fact in the parallel civil litigation,[371]

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365. *See, e.g.*, Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab., 171 F.R.D. 179, 181 (D. Md. 1997) (reviewing the Advisory Committee's note in interpreting FED. R. EVID. 412, the rape shield law); State v. MacRae, 677 A.2d 698, 703 (N.H. 1996) (noting that a defendant, in a sexual assault prosecution, cross-examined the accuser about contacting a private attorney before law enforcement authorities).

366. *See* Aiken, *supra* note 147, at 585 (noting the irony that the interpretation of discretionary elements in civil rape shield law might possibly be influenced by "the cultural preconceptions and biases that motivate the rule").

367. *E.g.*, State v. Davis, No. E2003-02162-CCA-R3-CD, 2004 WL 2378251, at *4 (Tenn. Crim. App. Oct. 25, 2004) (describing a case in which, during the rape prosecution, the victim's family admitted that they had contacted a civil lawyer before meeting with the police).

368. *E.g.*, People v. McFarley, 818 N.Y.S.2d 379, 380 (App. Div. 2006) (mem.) (explaining that the defendant was allowed to "explore his theory that the victim and her mother had a profit motive in accusing defendant of rape five months after the alleged rape occurred"). A delay in reporting could be due to a number of circumstances, many of which are completely understandable.

369. *E.g.*, Maslin v. State, 723 A.2d 490, 491 (Md. Ct. Spec. App. 1999) (holding that when the accuser alleged she suffered abuse as a college student, then waited twenty years to file criminal charges, after alleged assailant was "enjoying professional and political success," the trial court's exclusion of impeachment evidence about accuser's civil suit was reversible error under these suspicious circumstances).

370. *E.g.*, People v. Mink, 699 N.Y.S.2d 742, 744 (App. Div. 1999) (reversing conviction for sexual abuse because the trial court excluded proffered evidence that "after the incident, and before contacting the police, the victim told [her boyfriend] that she was looking for financial compensation from defendant and wanted his help in getting the money").

371. *See, e.g.*, State v. Strich, 915 A.2d 891, 903 (Conn. App. Ct. 2007) (holding, when the complainant attributed her injuries to different causes in the civil and criminal cases, that the accused should be able to impeach on this basis if he shows that the inconsistency is real and not speculative), *cert. denied*, 920 A.2d 310 (Conn. 2007), *cert. denied*, 128 S. Ct. 225 (2007); *cf.* Goode v. State, No. W2004-01577-CCA-R3-PC, 2005 WL 2759740 (Tenn. Crim. App. Oct. 25, 2005) (finding that counsel performed ineffectively by failing to impeach the victim with

and (6) evidence that the accuser made out-of-court statements revealing an intent to defraud the court or the accused.[372] The probative value of the impeachment is generally proportionate to the importance of the impeached witness in the government's overall proof.[373] This list of relevant considerations is not exhaustive, and none of these facts is separately dispositive, but each fact has at least some bearing on the admissibility of impeachment concerning accusers' civil claims.

The application notes should indicate that certain prosecutorial tactics open the door to the admission of evidence concerning an accuser's parallel civil litigation. For example, if the prosecutor affirmatively represents that the accuser has nothing to gain in filing charges, then the prosecution puts the civil suit in issue.[374] Even without an affirmative representation about the accuser's motive, if the prosecutor simply asks the jury to speculate what the accuser's motives could be, this tactic could warrant cross-examination of the accuser about any parallel civil litigation.[375]

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evidence of her inconsistent statements in a parallel proceeding, though the error was harmless); State v. Yarbrough, 596 So. 2d 311, 312 (La. Ct. App. 1992) (finding harmless error when the trial court denied opportunity for impeachment of accuser based on her inconsistent statements in civil deposition).

372. *E.g.*, *McFarley*, 818 N.Y.S.2d at 380 (finding, in a rape prosecution, reversible error when the trial court prevented the accused from inquiring about the accuser's statement before the alleged rape indicating that the accuser might want to frame an innocent person).

373. *Compare* People v. Griffin, 671 N.Y.S.2d 34, 36 (App. Div. 1998) (reversing a rape prosecution when the trial court prohibited impeachment evidence concerning the accuser's civil suit because "[it] was a one-witness case, where the credibility of the two people involved was the paramount issue for the jury to resolve"), *with* Poynor v. State, 962 So. 2d 68, 75 (Miss. Ct. App. 2007) (finding that the fact that a rape victim's family member spoke with an attorney about a possible tort claim was only relevant for in impeaching the family member's credibility).

374. *See* People v. Stein, 781 N.Y.S.2d 654, 655 (App. Div. 2004) (opining that the government's failure to disclose that accusers had filed tort claim notices was especially egregious because prosecutor told jury "there was no evidence that the complainants were bringing civil lawsuits as a result of the defendant's conduct"); Garcias v. State, No. 01-95-00177-CR, 1996 WL 155341, at *2 (Tex. App. Apr. 4, 1996) (holding that, after the prosecutor in a sexual assault case moved to exclude evidence concerning the accuser's civil suit, the prosecutor should not have argued in summation that "[complainant] and her family have never sued the apartment complex and it's been almost two years").

375. For example, in *State v. Whyde*, 632 P.2d 913 (Wash. Ct. App. 1981), the court reversed a rape conviction when, after the trial court excluded evidence of the victim's parallel suit, the prosecutor argued to the jury: "I think you have a right to ask yourself what reasonable motive would there be on her part to fabricate an incident of that nature? . . . What reason is there?" *Id.* at 915; *see also* People v. Wallert, 469 N.Y.S.2d 722, 724–25 (App. Div. 1983) (reversing exclusion of an impeachment concerning the accuser's civil suit because the prosecution argued to the jury that the accuser had no ulterior motive for bringing the rape complaint).

B. Ancillary Reforms

Section A suggests reforms in evidence codes that would help to reduce prejudice against accusers who bring civil suits. Evidence rules alone are not sufficient to address the problem, however. This Section recommends four additional reforms that would reduce the friction between parallel civil and criminal proceedings: (1) drafting pattern jury instructions, (2) enlarging limitations periods for filing civil claims while criminal prosecutions are pending, (3) extending rape shield laws to cover civil cases, and (4) developing new protocols for police officers.

1. *Pattern Jury Instructions.* After admitting evidence about accusers' civil suits, judges should provide guidance to jurors about how to weigh this evidence. Although the judge should not invade the province of the jury, the judge may identify general considerations for the jury to ponder in evaluating credibility. Many jurisdictions currently use pattern instructions to help the jury assess credibility of witnesses such as informants,[376] accomplices,[377] witnesses with prior criminal history,[378] witnesses who use addictive drugs,[379] witnesses with mental disabilities,[380] witnesses who make inconsistent statements,[381] witnesses who invoke privileges,[382] and government witnesses who cooperate pursuant to plea agreements.[383] The advantages of pattern

376. Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 2.07, *available at* http://www.med.uscourts.gov/practices/crpji.97nov.pdf.

377. *E.g.*, Connecticut Criminal Jury Instructions § 2.5-2, *available at* http://www.jud.ct.gov/ji/criminal/part2/2.5-2.htm.

378. *E.g.*, Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 2.03, *available at* http://www.med.uscourts.gov/practices/crpji.97nov.pdf; New York Criminal Jury Instructions, Credibility of Witnesses, *available at* http://www.nycourts.gov/cji/1-General/CJI2d.Credibility.pdf.

379. *E.g.*, Fifth Circuit Criminal Jury Instructions § 1.16, http://www.lb5.uscourts.gov/juryinstructions/crim2001.htm (last visited Feb. 9, 2008).

380. *E.g.*, California Criminal Jury Instructions § 331, *available at* http://www2.courtinfo.ca.gov/crimjuryinst/documents/crimjuryinst-draft.pdf.

381. *E.g.*, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § 6.1, *available at* http://www.ca11.uscourts.gov/documents/jury/crimjury.pdf; New York Criminal Jury Instructions, Credibility of Witnesses, *supra* note 378.

382. *E.g.*, Pattern Criminal Jury Instructions for the District Courts of the First Circuit, *supra* note 378, § 2.12; California Criminal Jury Instructions, *supra* note 380, § 320.

383. *E.g.*, Pattern Criminal Federal Jury Instructions for the Seventh Circuit § 3.13, *available at* http://www.ca7.uscourts.gov/pjury.pdf.

instructions are manifold: they are uniform, predictable, and likely to withstand appellate review.

In the particular context of rape prosecutions, pattern instructions regarding testimony by accusers with parallel civil suits would be very useful. Parties in these cases have sought widely divergent instructions. Some have asked courts for an instruction that civil claimants always lack credibility as accusers,[384] while others have sought an instruction that civil suits are completely innocuous.[385] Courts should steer clear of these extremes because a per se rule of credibility would usurp juries' factfinding role.[386] An instruction that emphasizes the jury's ultimate authority as factfinder, while highlighting considerations relevant to the assessment of evidence regarding civil suits, would bring clarity to an area in which jurors might otherwise be prone to misconceptions.[387]

A model for appropriate jury instructions appears in Appendix B of this Article. The proposed instruction stresses the jury's primacy as the arbiter of credibility. The instruction explains that the jury should only consider evidence of the parallel suit insofar as it affects the credibility of a witness.[388] The instruction cautions the jury against inferring the defendant's guilt from the civil litigation.[389] It indicates that the plaintiff has a right to file a civil suit and that the civil suit need not await the conclusion of the criminal prosecution, but the

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384. *See, e.g.*, People v. Pereda, 607 N.Y.S.2d 98, 100 (App. Div. 1994) (holding that, in a rape prosecution in which the accusers had filed parallel civil claims by accusers, the trial court "appropriately denied the defendant's request to charge the jury that the complainants were interested as a matter of law").

385. *See, e.g.*, State v. Ross, 685 A.2d 1234, 1235 (N.H. 1996) (ruling, in a rape prosecution, that, the trial court erred when it instructed the jury that the accuser had "every right" to bring a lawsuit against the accused, that lawsuits were "not unusual," and that filing the civil suit definitely did not affect the accuser's credibility).

386. *Id.* (holding that the trial court should not have instructed the jury that "the complainant's pending civil suit had no bearing on her credibility as a witness in the criminal trial as a matter of law"); *Pereda*, 607 N.Y.S.2d at 100 (holding that trial courts may not instruct juror that civil claimants in rape prosecutions are biased "as a matter of law").

387. *E.g.*, Savastano v. Hollis, Nos. 02-CV-3299 (JBW), 03-MISC-0066 (JBW), 2003 WL 22956949, at *18 (E.D.N.Y. Oct. 10, 2003) (holding, in a rape prosecution, that, the trial court did not err in instructing the jury that "the law encourages civil lawsuits" and "the fact of a civil lawsuit alone does not make a criminal complainant more or less credible").

388. *Cf.* Akin v. State, 698 So. 2d 228, 237 (Ala. Crim. App. 1997) (upholding the trial court's instruction that the jury "may consider [the parallel suit], and only consider it insofar as it may affect a particular witness's testimony").

389. Torrey, *supra* note 86, at 1045. Until 1975, this language was mandatory in jury instructions for all rape trials in California. *Id.* at 1045 n.157 (collecting other examples of jury instructions reinforcing jurors' instinctive prejudice in rape prosecutions).

instruction does foreclose any adverse inference from the civil suit. This instruction might require modification in some cases, but it provides a good starting point.

Historically, jury instructions in rape prosecutions have served to reinforce myths about accusers' credibility.[390] For example, a mandatory jury instruction in California virtually insisted upon incredulity: "The law requires that you examine the testimony of the female person named in the information with caution."[391] The Model Penal Code also advised that judges give a jury instruction urging ginger treatment of an alleged rape victim's testimony.[392] Because psychologists and legal experts have identified the susceptibility of jurors to prejudice against accusers in rape cases,[393] it is important for jury instructions to correct, rather than to compound, jurors' natural biases to disfavor accusers. A pattern jury instruction that guides jurors who hear evidence of an accuser's parallel civil litigation would help ensure impartial consideration of the evidence in rape prosecutions.

2. *Tolling Provisions for Civil Statutes of Limitation.* Any effort to improve the compatibility of civil and criminal systems in rape cases must take account of the constraints imposed by civil statutes of limitations. A significant number of statutes impose one-year[394] or two-year[395] deadlines for the filing of civil claims alleging assault or

390. *Id.* at 1045.

391. *Id.* at 1045. Until 1975, this language was mandatory in jury instructions for all rape trials in California. *Id.* at 1045 n.157.

392. "In any prosecution before a jury for a [sex offense], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged activities carried out in private." MODEL PENAL CODE § 213.6(5) (1962).

393. *See supra* note 257 and accompanying text.

394. ARK. CODE ANN. § 16-56-104 (2007); COL. REV. STAT. § 13-80-103 (2007); D.C. CODE § 12-301 (2001); KAN. STAT. ANN. § 60-514 (2005); KY. REV. STAT. ANN. § 413.140(1)(a) (West 2006); LA. CIV. CODE ANN. art. 3492 (1994); MD. CODE ANN., CTS. & JUD. PROC. § 5-105 (LexisNexis 2006); MISS. CODE ANN. § 15-1-35 (2003); OHIO REV. CODE ANN. § 2305.111 (West 2004); OKLA. STAT. ANN. tit. 12, § 95 (West 2000); TENN. CODE ANN. § 28-3-104 (2000); WYO. STAT. ANN. § 1-3-105 (2007).

395. ARIZ. REV. STAT. ANN § 12-542 (2003); CAL. CIV. PROC. CODE § 335.1 (West 2006); DEL. CODE ANN. tit. 10, § 8119 (1999); GA. CODE ANN. § 9-3-33 (2007); HAW. REV. STAT. ANN. § 657-7 (LexisNexis 2007); IDAHO CODE ANN. § 5-219 (2004); 735 ILL. COMP. STAT. 5/13-202 (West 2005); IND. CODE ANN. § 34-11-2-4 (LexisNexis 2007); IOWA CODE ANN. § 614.1 (West 2001); ME. REV. STAT. ANN. tit. 14, § 753 (2003); MICH. COMP. LAWS ANN. § 600.5805(2) (West 2005); MINN. STAT. ANN. § 541.07 (West 2000); MO. ANN. STAT. § 516.140 (West 2007); MONT.

battery. Many states have extended the limitations period for civil claims alleging sexual abuse of a child,[396] but claims alleging assaults against adults are usually subject to the one- or two-year limitations periods. Moreover, irrespective of the particular tort alleged in the lawsuit, the limitations period for suits seeking punitive damages is generally one year.[397]

The short timetable for the filing of civil claims exacerbates the conflicts between the civil and criminal justice systems. Prosecutors sometimes pressure rape survivors to postpone the filing of civil claims.[398] Prosecutors occasionally dismiss charges when accusers file civil claims before the prosecution goes to trial.[399] It appears that many prosecutors believe criminal and civil cases cannot coexist, at least at the same time.

CODE ANN. § 27-2-204(3) (2007); NEV. REV. STAT. ANN. § 11.190 (LexisNexis 2007); N.J. STAT. ANN. § 2A:14-2 (West 2002); N.D. CENT. CODE § 28-01-18 (1997) ; OR. REV. STAT. § 12.110 (2005); 42 PA. CONS. STAT. ANN. § 5524 (West 2007); S.D. CODIFIED LAWS § 15-2-15 (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 1994); VA. CODE ANN. § 8.01-243 (2004); WASH. REV. CODE ANN. § 4.16.100 (West 2001); W. VA. CODE ANN. § 55-2-12 (LexisNexis 2006) ; WIS. STAT. ANN. § 893.57 (West 2001).

396. ALASKA STAT. § 09.10.140 (2006); ALA. CODE § 6-2-8 (LexisNexis 2005); ARK. CODE ANN. § 16-56-104 (2007); ARIZ. REV. STAT. ANN. § 12-502 (2003); COLO. REV. STAT. ANN. § 13-80-103.7 (2007); CONN. GEN. STAT. ANN. § 52-577(d) (West 2000); D.C. CODE § 12-302 (2001); DEL. CODE ANN. tit. 10, § 8145 (1999); FLA. STAT. ANN. § 95.11(7) (West 2006); GA. CODE ANN. § 9-3-33.1 (2007); 735 ILL. COMP. STAT. 5/13-202.2 (West 2005); IOWA CODE ANN. § 614.1 (West 2001); KAN. STAT. ANN. § 60-523 (2005); KY. REV. STAT. ANN. § 413.249 (West 2006); ME. REV. STAT. ANN. tit. 14, § 752-c (2003); MD. CODE ANN., CTS. & JUD. PROC. § 5-117 (LexisNexis 2006); MASS. ANN. LAWS ch. 260, § 4C (LexisNexis 2002); MINN. STAT. ANN. § 541.15 (West 2000); MO. ANN. STAT. § 537.046 (West 2007); MONT. CODE ANN. § 27-2-216 (2007); N.H. REV. STAT. ANN. § 508-4-g (LexisNexis 2006); N.J. STAT. ANN. § 2A:61B-1 (West 2002); N.M. STAT. § 37-1-30 (2003); NEV. REV. STAT. ANN. § 11.215 (LexisNexis 2007); N.C. GEN. STAT. ANN. § 1-52(5) (West 2000); OHIO REV. CODE ANN. § 2305.111 (2004); OKLA. STAT. ANN. tit. 12, § 95 (West 2000); OR. REV. STAT. § 12.117 (2005); 42 PA. CONS. STAT. ANN. § 5533 (West 2007); R.I. GEN. LAWS § 9-1-51 (2004); S.C. CODE ANN. § 15-3-555 (2007); S.D. CODIFIED LAWS § 26-10-25 (2006); TENN. CODE ANN. § 28-3-106 (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1994); UTAH CODE ANN. § 78-12-25.1 (2003); VT. STAT. ANN. tit.12, § 522 (2002); WASH. REV. CODE ANN. § 4.16.340 (West 2004); WIS. STAT. ANN. § 893.587 (West 2001); WYO. STAT. ANN. § 1-3-105 (2007).

397. *E.g.*, Sebok, *supra* note 82 (noting that Colorado's limitations period for lawsuits alleging sexual assault is two years but the limitations period for lawsuits alleging punitive damages is only one year).

398. *E.g.*, Webb v. State, 232 S.W.3d 109, 111 (Tex. Crim. App. 2007) (recounting that a prosecutor dissuaded a rape complainant's civil attorney from filing tort claims until end of criminal trial); *see also* State v. Ahmed, No. 84220, 2005 WL 1406282, at *12 (Ohio Ct. App. June 16, 2005) (refusing to reverse the defendant's rape conviction, although the prosecutor pressured the accuser to drop her civil claim against defendant).

399. *See supra* note 137.

Even without pressure from prosecutors, survivors may feel uncomfortable proceeding with civil claims while the prosecution is pending.[400] Survivors may feel that the burden of simultaneous civil and criminal proceedings would be too overwhelming. They may worry about their vulnerability to impeachment or discovery if the two actions proceed at once. Survivors may not even know until the end of the criminal trial whether they want to file civil claims: they may want to see what the evidence shows during the criminal trial, or they may want to see what amount of restitution the court orders. Although a number of rape survivors may find simultaneous civil and criminal proceedings to be advantageous,[401] others may prefer successive proceedings.

The law should permit survivors to make this decision. All states should adopt tolling provisions to allow the filing of claims for sexual assault (and perhaps other categories of claims) within one year of the defendant's conviction or release from incarceration, whichever is later. A few states have adopted such tolling provisions already.[402] These provisions do not conflict with the primary rationales for statutes of limitation—repose for defendants and preservation of the evidence—because the pending prosecution ensures that all parties are aware of the controversy and are vigilant to retain evidence. Tolling provisions for are necessary to avoid a windfall for defendants when timing constraints lead to the abandonment of either criminal charges or civil claims.

3. *Protocols for Police Agencies.* Police agencies should adopt new protocols requiring officers to apprise rape survivors of their right to seek civil redress. Officers should read a standard form indicating the procedures and time constraints for bringing civil suits. They should explain that victims might be able to sue not only the perpetrators but also third parties who bear some responsibility for the assaults. Perhaps the standard form could include a brief description of the remedies available in civil law and a comparison of civil and criminal recourse. Hopefully the statement that relays this

400. *See* Bublick, *supra* note 1, at 70 (arguing that "[s]tatutes [o]f limitation have been a barrier to some victim suits," because the statutes impose short windows for intentional torts).

401. *See supra* Part I.B.

402. ARIZ. REV. STAT. ANN. § 12-511 (2003); CONN. GEN. STAT. ANN. § 52-577(e) (West 2000); IDAHO CODE ANN. § 5-248(1) (2004); 735 ILL. COMP. STAT. ANN. 5/13-214.1 (West 2005); N.Y.C.P.L.R. § 213-b (McKinney 2007); VA. CODE ANN. § 8.1-228(k) (2004).

information could be short enough for officers to memorize, just as they have memorized *Miranda* warnings.[403]

If police notified rape survivors of their right to sue, a higher proportion of survivors would consider this option. The efficacy of imparting information to rape survivors through police is evident in a number of examples. When police began advising survivors about the availability of rape crisis centers, the number of survivors using these services grew.[404] When police began notifying survivors about the value of counseling and therapy, the use of these resources increased as well.[405] Greater awareness of civil remedies for rape would bring wide benefits, not only to survivors but also to society as a whole.[406]

Police encouragement of civil remedies would also help to overcome juries' prejudice against civil litigation by accusers. If a jury in a criminal case heard that an alleged rape victim visited with a civil attorney because a police officer had recommended it, that jury would be less likely to see the consultation as an indication of the accuser's greed. Just as the *Miranda* warning legitimizes postarrest silence,[407] the officers' recommendation of civil remedies might help to diminish the stigma that attends rape suits.

CONCLUSION

This Article examines trial courts' routine admission of impeachment evidence that accusers in rape prosecutions are suing

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403. For model for a straightforward presentation of civil remedies to rape survivors, see A GUIDE TO CIVIL LAWSUITS: PRACTICAL CONSIDERATIONS FOR SURVIVORS OF RAPE AND CHILDHOOD SEXUAL ABUSE (2007), published by the Illinois Coalition Against Sexual Assault.

404. Rachel M. Capoccia, *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 68 S. CAL. L. REV. 1335, 1350 (1995) (noting that police have referred rape survivors to crisis centers and that the number of victims seeking these services has increased).

405. A large number of police agencies now steer rape survivors to counseling services. *See, e.g.*, Detroit Police Department (Rape Counseling Center), http://www.ci.detroit.mi.us/police/dept/chief/rcc_m.htm (last visited Feb. 9, 2008) (providing information about rape counseling); Univ. of Md., Consolidated USMH & UMCP Policies and Procedures Manual (Apr. 17, 1995), http://www.president.umd.edu/policies/vi130a.html ("Police will assist in arranging for counseling or other resources if the survivor wishes . . . ."); Rape, Abuse & Incest Nat'l Network, Violence Against Women Act of 2005: Sexual Assault Services Program, http://www.rainn.org/policy/sexual-assault-services-program-2006.html (last visited Feb. 9, 2008) (noting the increased demand for counseling services).

406. *See supra* Part I.A.

407. Doyle v. Ohio, 426 U.S. 610, 617 (1976) (holding that the prosecution could not impeach the accused for following *Miranda* warnings because this fact is of scant relevance to guilt or innocence and because government induced his silence).

the accused or third parties. The evidence has questionable relevance, and its prejudicial effect far outweighs its probative value. Moreover, when accusers face onerous cross-examination for pursuing both criminal and civil remedies, they are likely to forego one of these avenues of redress.

The accused has a right to attempt impeachment of the accuser—including, in some cases, impeachment with reference to civil litigation arising from the same facts as the criminal indictment. But the evidence codes may impose reasonable limits on the scope of permissible impeachment.

Law has an important expressive function.[408] Presently the impeachment rules express the judgment that civil suits indicate ill motives on the part of accusers. Yet there is nothing wrong with suing a rapist. There is no shame in seeking civil remedies for one of the most egregious torts imaginable. To the contrary, the *denial* of civil recourse to survivors of sexual assault is unconscionable.[409]

The impeachment rules in criminal cases should not force an election of remedies. Survivors of rape should be able to avail themselves of both the criminal and civil justice systems. Impeachment of accusers based on parallel civil litigation should require, as a predicate, a particularized showing of relevance that exceeds prejudice, and the impeachment should follow the other guidelines proposed in this Article.

As in the case of the rape shield laws, the new requirements would enhance the truth-seeking function in criminal prosecutions by excluding prejudicial evidence. The new rules would also embolden more rape survivors to vindicate their rights in both the criminal and civil justice systems.

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408. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043 (1996) (discussing law's expressive function in promoting social norms, particularly gender equality).

409. *See* Hurst v. Capitell, 539 So. 2d 264, 266 (Ala. 1989) ("To leave children who are victims of [sexual abuse] without a right to redress those wrongs in a civil action is unconscionable."); Henderson v. Woolley, 644 A.2d 1303, 1307 (Conn. 1994); *see also supra* Part I.A.

APPENDIX 1 PROPOSED RULE OF EVIDENCE

Rule 416. Impeachment with Evidence of Civil Claim

(a) Requirements for admission. In a criminal prosecution, a witness is not subject to impeachment with evidence that the witness has filed or has contemplated filing a civil claim asserting the liability of the accused or a third party based on some or all of the facts alleged by the government in the prosecution unless the proponent of the impeachment evidence meets all of the following requirements: (1) the proponent must make a particularized showing that the probative value of this evidence, supported by specific facts and circumstances, outweighs its prejudicial effect; (2) the proponent must refrain from introducing copies of the complaint or other pleadings in the civil action; (3) the proponent must refrain from discussing the wealth or poverty of the witness or the accused; (4) the proponent must not mention the amount of damages sought or the settlement reached in the civil claim; and (5) if the witness has not yet filed a civil claim, the proponent must show that the victim's intention to file a claim has manifested itself in one or more overt actions or statements.

(b) Exceptions. Whether or not the proponent meets the requirements listed in subdivision (a) above, evidence that a witness has filed or has contemplated filing a civil action is admissible in the following circumstances: (1) this evidence is admissible to show the witness has made statements that are materially inconsistent with the testimony of the witness in the present criminal prosecution; (2) this evidence is admissible if the government is prosecuting the witness in the instant case for perjury, witness tampering, or a similar offense involving misuse of the judicial process; and (3) this evidence is admissible when its exclusion would violate the constitutional rights of the accused.

(c) Procedure. A party intending to offer evidence subject to this rule must file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial. Before admitting any evidence subject to this rule, the court shall conduct a hearing in camera and shall afford the witness and parties a right to attend and be heard. If the court rules that evidence subject to this rule is admissible, the court may, upon motion of a party or at the court's own initiative, instruct the jury about the proper use of this evidence.

APPENDIX 2: PROPOSED PATTERN JURY INSTRUCTION

Prosecution Witness with Civil Claim

You have heard evidence indicating that a prosecution witness has filed a civil lawsuit against [*the accused*] [*another party*]. The weight that you give to that evidence is up to you. If you find that the witness has an interest in the civil suit that might shade the testimony of the witness in the present trial, you may consider that possibility in assessing the credibility of the witness. You are not required to find that the civil suit affects the credibility of the witness in the present case.

I instruct you that the legal system does not prohibit a witness in a criminal trial from filing a civil suit based on the same facts or similar facts. A witness in a criminal trial has no obligation to wait until the end of a criminal trial to file a civil suit based on the same facts or similar facts.

The act of [*indicate offense at issue, e.g., rape*] is not only a crime under the laws of [*indicate jurisdiction*], but it is also a tort. A person who believes he has suffered a tort has a right to bring a civil lawsuit seeking an award of money or other relief such as an order requiring changes in the defendant's conduct.

You should not consider the civil case for any purpose other than to assess the credibility of the witness who is involved in the civil case. You should not attempt to predict the outcome of the civil case. You should not try to evaluate the need for punishment in the present case based on what you expect may happen in the civil case.

I instruct you that the filing of a civil lawsuit against [*the accused*] [*another party*] does not necessarily mean that the accused has committed any wrongful conduct. Bear in mind that the standard of proof is lower for a claimant in the civil system than it is for the prosecution in the present case.

The civil case will have a separate jury if it goes to trial. You will not be on that jury. Your task is to determine whether, in the present case, the prosecution has proven each element of each charged offense beyond a reasonable doubt.