

**TWELVE YEARS POST *MORRISON*: STATE CIVIL  
REMEDIES AND A PROPOSED GOVERNMENT  
SUBSIDY TO INCENTIVIZE CLAIMS  
BY RAPE SURVIVORS**

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## INTRODUCTION

In the early 1990s the American feminist agenda was dominated by the importance of passing the Violence Against Women Act (VAWA).<sup>1</sup> Women's rights advocates demanded enhanced investigation and prosecution of gender violence crimes, and a federal civil right to be free from gender motivated violence.<sup>2</sup> In 1994, following four years of Congressional hearings on VAWA, feminists heralded its passage as a landmark recognition of gender violence as a civil rights issue.<sup>3</sup> Since then, the Office on Violence Against Women has awarded over \$4.6 billion in gender violence grants,<sup>4</sup> but the majority of public debate, press coverage, and academic scholarship has focused on VAWA's civil remedy.<sup>5</sup> VAWA's civil remedy provided gender violence victims with a federal cause of action for "crime[s] of violence motivated by gender."<sup>6</sup> Catharine MacKinnon described the civil remedy as a "historic stand and hopeful step toward free and safe lives for women as equal citizens of this nation."<sup>7</sup>

In 2000, the Supreme Court in *United States v. Morrison* held VAWA's civil remedy for gender violence survivors unconstitutional because it exceeded Congress's authority under the Commerce Clause.<sup>8</sup> When the Court struck down the civil remedy in *Morrison*,<sup>9</sup> scholars and activists decried the

<sup>1</sup> See Sarah F. Russell, *Covering Women And Violence: Media Treatment Of VAWA's Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327, 328–29 (2003) (discussing the pervasive media coverage of VAWA and the public debate surrounding it).

<sup>2</sup> See Renée L. Jarusinsky, *Gender Difference In Perceiving Violence And Its Implication For The VAWA's Civil Rights Remedy*, 27 FORDHAM URB. L.J. 965, 975 (2000) (explaining "the VAWA's civil rights remedy was intended to fill 'the gender gap in current civil rights laws,' and to avoid discriminatory state laws and practices").

<sup>3</sup> See Russell, *supra* note 1, at 328–29.

<sup>4</sup> Press Release, Department of Justice, Statement of the Attorney General on the Passage of the Reauthorization of the Violence Against Women Act, (April 26, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-ag-549.html>.

<sup>5</sup> See, e.g., Jarusinsky, *supra* note 2; Derek W. Kelley, *Current Developments In The Law: A Survey Of Federal Cases Involving The Constitutionality Of The Violence Against Women Act*, 9 B.U. PUB. INT. L.J. 133 (1999); Darold W. Killmer & Mari Newman, *VAWA: A Civil Rights Tool For Survivors Of Gender-Motivated Violence*, 28 COLO. LAW. 77 (1999); *Domestic Violence is the Target of a Bill*, N.Y. TIMES, Dec. 16, 1990, at A18.

<sup>6</sup> 42 U.S.C. § 13981 (1994).

<sup>7</sup> Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 138 (2000).

<sup>8</sup> 529 U.S. 598 (2000).

<sup>9</sup> Although the Supreme Court ruled that the federal civil remedy was unconstitutional in *Morrison*, the rest of VAWA remains intact, providing states with \$1.6 billion dollars annually to finance programs addressing violence against women. Press Release, U.S. Department of Justice, Justice Department Commemorates Fifteen Years of the Vio-

decision as apocalyptic.<sup>10</sup> Yet, in truth, only a handful of gender violence survivors ever attempted to utilize the federal civil remedy,<sup>11</sup> and only an extraordinarily small proportion of survivors are utilizing the state civil remedies available today.<sup>12</sup> The feminist academic and activist community must face the discrepancy between what is available to survivors in theory and what is useful to survivors in fact.

With only two to four percent of rapes resulting in convictions,<sup>13</sup> the criminal justice system's response to rape is an unmitigated disaster. Rape is the violent crime resulting in the fewest criminal complaints, arrests, and prosecutions in the United States.<sup>14</sup> In 2007, the Department of Justice estimated that one million women in the United States are raped each year.<sup>15</sup> The criminal justice regime has proven incapable of deterring or punishing rape or providing justice for millions of rape survivors, and particularly fails to obtain convictions for acquaintance rape, despite extensive reform efforts.<sup>16</sup> The civil system offers a second possible avenue for accomplishing what the government has proven incapable of accomplishing in the criminal realm: a viable deterrent and punishment for rape. At present, however, in

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lence Against Women Act, (Sept. 14, 2009), available at <http://www.justice.gov/opa/pr/2009/September/09-ag-953.html> ("Every day, VAWA funding makes a difference in how communities across America help victims and hold offenders accountable. For example, subgrantees receiving funding awarded by states through OVW's STOP Violence Against Women Formula Grant Program reported that, in calendar year 2007:

- More than 505,000 victims were served;
- Over 1,201,000 services were provided to victims; and
- More than 4,700 individuals were arrested for violations of protection orders.")

<sup>10</sup> See, e.g., MacKinnon, *supra* note 7, at 177 ("The VAWA stood for the principle that a woman could not, with impunity, be assaulted anywhere in this nation simply because she is a woman. It put the power to dispute male sovereignty in women's hands. The *Morrison* majority decided that the union could not permit that and be the same union it was. The ruling thus raised, as no case before it has, the question whether a nation organized to preclude relief for the violation of one half of its people by the other should survive.").

<sup>11</sup> See Christopher James Regan, *A Whole Lot Of Nothing Going On: The Civil Rights "Remedy" Of The Violence Against Women Act*, 75 NOTRE DAME L. REV. 797, 797, 800 (1999) (noting that VAWA is referenced in more journal articles than court cases and that within the first five years it was in force, the civil remedy was used in fewer than forty reported cases); NANCY MEYER-EMERICK, *THE VIOLENCE AGAINST WOMEN ACT OF 1994: AN ANALYSIS OF INTENT AND PERCEPTION* 5 (2001).

<sup>12</sup> See *infra* Part II.D.

<sup>13</sup> Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J. L. & GENDER 263, 264 (2012) (citing DEAN G. KILPATRICK ET AL., *DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 2* (2007), available at [www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf)). This estimate encompasses all nonconsensual sex, whether reported or unreported. *Id.*

<sup>14</sup> See *id.*

<sup>15</sup> *Id.* Rape statistics are notoriously difficult to pin down. Underreporting and societal stigma contribute to the difficulty of determining accurate estimates. The definition of rape also varies by state jurisdiction. For the purposes of this article I define rape as all nonconsensual sex.

<sup>16</sup> See generally Richard Klein, *An Analysis Of Thirty-Five Years Of Rape Reform: A Frustrating Search For Fundamental Fairness*, 41 AKRON L. REV. 981 (2008) (analyzing the most significant changes in the manner in which rape defendants are prosecuted).

part because of the financial expense of litigation,<sup>17</sup> the proportion of rape survivors who file civil suits is extremely low.<sup>18</sup>

In Part I, I explore the necessity, availability, and use of state civil remedies for rape survivors. First, I explore the goals of rape survivors and the dynamics of acquaintance rape. This exploration is foundational to an analysis of what legal avenues are best suited to meeting the goals of acquaintance rape survivors. Second, I briefly review how the criminal justice system fails to provide adequate deterrence or punishment for acquaintance rape. Third, I review the relative advantages of civil remedies for rape survivors, such as monetary damages and increased control over the course of litigation. Fourth, I evaluate, in the wake of *Morrison*, the state civil remedies available to rape survivors, analyzing their merits and weaknesses.

While sexual assault survivors may choose not to sue for a myriad of reasons, the survivors who wish to sue need to be financially enabled to pursue their claims, and the plaintiffs' bar needs to be financially incentivized to represent them. In the proceeding parts, I analyze the existing frameworks of government subsidization of civil lawsuits, and draw upon these frameworks to propose an enhanced subsidy for civil suits by sexual assault survivors. In Part II, I first review the origin and policy reasons for private attorney general subsidies, and discuss how *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources* hurt the effectiveness of the primary tool for incentivizing private attorney general actions: fee-shifting provisions.<sup>19</sup> I argue lawsuits by sexual assault survivors, like other civil rights suits, should be conceptualized as private attorney general actions. I note that while statutory fee-shifting provisions are already in place in the gender violence remedies of several states, unlike traditional civil rights remedies, gender violence remedies are rarely used. Civil rights claims are traditionally against deep-pocketed institutional defendants where the potential financial gain for plaintiffs' counsel is greater than it would be against an individual defendant in a gender violence claim. The potential recovery from an individual defendant is most often too low to incentivize the plaintiffs' bar to take gender violence cases on a contingency fee basis. I conclude that fee-shifting is a sufficient financial incentive for traditional civil rights actions but not for rape claims against individual assailants. Next, I examine two types of government subsidies for civil suits outside the private attorney general context: civil Gideon provisions and government agency enforcement actions. I conclude that while both forms of subsidies have distinct advantages, neither type of subsidy would be ideal to incentivize lawsuits by sexual assault survivors against individual perpetrators.

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<sup>17</sup> See Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 734 (2007).

<sup>18</sup> Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1615 (2008).

<sup>19</sup> See *Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001).

Part III synthesizes the strengths of the three examined types of government subsidies: private attorney general provisions, civil Gideon provisions, and government agency enforcement actions, to construct the proposed survivor recovery subsidy. In this part, I explain the mechanics of my proposal, and its attractiveness to the plaintiffs' bar and to survivors seeking civil recovery. Finally, I address constitutional, practical, and feminist objections to my proposal.

I. A SURVEY OF THE NECESSITY, AVAILABILITY, AND USE OF STATE CIVIL REMEDIES FOR RAPE SURVIVORS

A. *Acquaintance Rape Survivors' Goals*

A summary of the particular circumstances and goals of acquaintance rape survivors is both central and foundational to an inquiry into the advantages and disadvantages of legal remedies for acquaintance rape survivors. First, we must account for the particular circumstances of acquaintance rape survivors, as distinct from stranger rape survivors. Of course, each rape survivor is different, and his or her goals and needs will vary according to his or her particular background and circumstances.<sup>20</sup> However, the need for privacy, autonomy, and financial restitution during the healing process is salient among a large proportion of rape survivors, and while incarceration of the perpetrator is a goal of some rape survivors, a more common goal is merely exposure of the offender as an offender.<sup>21</sup>

While much of this article may also be applicable to stranger rape survivors or other gender violence victims, the focus of my discussion is on the particular needs of acquaintance rape survivors.<sup>22</sup> The most common form of rape does not involve a violent assault by a stranger, a knife, beating, or a threat of death.<sup>23</sup> Instead, the statistical norm of sexual assault in America

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<sup>20</sup> See Michelle Seyler, *Rape in Conflict: Battling the Impunity that Stifles Its Recognition as a Jus Cogens Human Right*, 15 GONZ. J. INT'L L. 30, 46 (2011) ("Women generally, and rape survivors specifically, have varying needs due to the very fact that rape crimes do not fit into a box.")

<sup>21</sup> See Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. LEGAL STUD. 825, 838 (2011).

<sup>22</sup> Acquaintance rape survivors and stranger rape survivors are differently situated with respect to society and the justice system. Acquaintance rape survivors face a much starker history of discrimination and marginalization than stranger rape survivors. The criminal justice system is comparably successful at prosecuting stranger rapes. See generally Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing For Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 397 (2005). Because the dangers inherent in domestic violence relationships differ substantially from the dynamics of rape, I have not attempted to assess the applicability of my analysis or proposal to domestic violence survivors.

<sup>23</sup> See Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Survivors*, 13 NEW CRIM. L. REV. 644, 645–46 (2010) [hereinafter Anderson, *Diminishing the Legal Impact*].

involves unwanted sex between acquaintances that does not involve gruesome violence or weapons.<sup>24</sup> Many acquaintance rapists plan their assault by targeting women who are intoxicated, or they use alcohol or other “substances to facilitate the assault.”<sup>25</sup> Acquaintance rape victims are particularly discouraged from bringing legal claims and particularly disadvantaged when they do bring claims. “Due to a lack of physical injury, the victim’s drunkenness, and the close social relationship between assailants and victims most victims are unlikely to report the assault, those that do report are less likely to be believed.”<sup>26</sup>

Rape survivors keenly desire privacy and autonomy during both the healing and the legal process. A frequently cited reason rape survivors do not report their rape is because of their desire for privacy.<sup>27</sup> When survivors do report their rapes, they face an onslaught to their privacy from their immediate community, police investigators, media outlets, prosecutors, and defense attorneys.<sup>28</sup> Many rape survivors do not want others to know about the rape.<sup>29</sup> Rape survivors’ fear of invasion of privacy is well-founded: “[i]nformation that would be considered personal and private for anyone other than a crime survivor is often included in news reports about trials. As a result, communities often stigmatize and ostracize survivors.”<sup>30</sup> A survivor’s desire for privacy also often stems from a fear that the perpetrator will harm her or re-victimize her if she reports.<sup>31</sup> As such, a survivor’s desire for privacy and control over the dissemination of information about her rape and her background is a significant obstacle to her pursuit of legal remedies. Autonomy is one of the greatest needs of survivors during the healing pro-

<sup>24</sup> *Id.*

<sup>25</sup> Reardon, *supra* note 22, at 397 (“Eighty percent of assailants describe using alcohol and drugs as a tool to overcome their victims.”). While the vast majority of acquaintance rapists are male, victims are both male and female. Throughout the article I often use female pronouns when referring to survivors because the majority are female. That said, men account for about ten percent of rape victims and my intent is not to gender the term “survivor.” *Rape Statistics*, RAPE TRAUMA SERVICES, available at <http://www.rapetraumaservices.org/rape-sexual-assault.html> (last visited Mar. 19, 2012).

<sup>26</sup> Reardon, *supra* note 22, at 398.

<sup>27</sup> *Reporting of Sexual Violence Incidents*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/crime/rape-sexual-violence/rape-notification.htm> (last visited Dec. 14, 2012).

<sup>28</sup> See, e.g., Suzanne M. Leone, *Protecting Rape Survivors’ Identities: Balance Between the Right to Privacy and the First Amendment*, 27 NEW ENG. L. REV. 883, 883–84 (1993) (discussing the lack of privacy for victims resulting from media attention to rape cases).

<sup>29</sup> Hayley Jodoin, *Closing the Loophole in Massachusetts Protection Order Legislation to Provide Greater Security for Survivors of Sexual Assault: Has Massachusetts General Laws Chapter 258e Closed It Enough?*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 102, 106 n.26 (2012).

<sup>30</sup> Stephen D. Easton, *Whose Life is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Survivors*, 49 S.C. L. REV. 1, 31–32. For example, “[i]n rape cases, the survivor’s social and sexual history are often explored at length in news reports and in defense efforts to establish consent.” *Id.* at 30.

<sup>31</sup> *Id.* at 32.

cess.<sup>32</sup> Because survivors will have different needs and perspectives, survivor autonomy in selecting the appropriate legal remedy is vital.

Because the financial impact of rape is particularly costly for survivors, financial restitution or monetary damages are useful and desirable for many survivors. The financial costs of rape to survivors include both direct and indirect losses. Direct economic losses to crime survivors include lost wages and medical expenses.<sup>33</sup> The majority of crime survivors suffer direct economic losses and these losses can be particularly acute where the survivor lacks insurance.<sup>34</sup> Indirect financial losses include “pain and suffering, emotional distress, and other hardships.”<sup>35</sup> Because pain and suffering costs are particularly pronounced for rape survivors, the total cost of crime to the average rape survivor has been estimated to be more than three times the cost to the average robbery or assault survivor.<sup>36</sup> As such, rape survivors are particularly in need of financial restitution.

The goals of society and rape survivors often conflict with respect to punishment. Feminists are generally in agreement that a core goal of criminal justice reform for rape survivors should be increased incarceration of perpetrators.<sup>37</sup> For many rape survivors, incarceration of their perpetrators is not a key goal.<sup>38</sup> Rape survivors generally cite exposure of the offender as an offender as more important than incarceration.<sup>39</sup> According to interviews with survivors of domestic and sexual violence, it is often more important to a survivor to “deprive a perpetrator of undeserved honor and status than to deprive them of either liberty or fortune.”<sup>40</sup> Many survivors desire not only acknowledgement from the offender, but also validation from bystanders.<sup>41</sup> Thus, “[s]urvivor-led justice” will not always be “synonymous with increasingly punitive attitudes or a predominant focus on convictions and imprisonment.”<sup>42</sup> Public shaming rather than incarceration would better suit the wishes of many rape survivors.

<sup>32</sup> See Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 279 (2005).

<sup>33</sup> Easton, *supra* note 30, at 33 (“A shotgun assault survivor may . . . bear up to \$5 million in lost income and medical expenses over a thirty-five-year working life.”).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* at 33–34.

<sup>37</sup> See generally Michelle Anderson, *Rape Law Reform Based on Negotiation: Beyond the No and Yes Models*, in CRIMINAL LAW CONVERSATIONS 295–304 (Paul H. Robinson, Stephen P. Garvey, & Kimberly Kessler Ferzan eds., 2009); Anderson, *Diminishing the Legal Impact*, *supra* note 21; Catharine MacKinnon, *A Sex Equality Approach to Sexual Assault*, in SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT 265–75 (R. A. Prentky et al. eds., 2003).

<sup>38</sup> See McGlynn, *supra* note 21, at 838.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing Judith Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 589 (2005)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 842.

*B. Inadequacy of Criminal Law to Deter Rape, Punish Rapists, or Compensate Acquaintance Rape Survivors*

Scholarship describing the inadequacies of the criminal justice system to prosecute rape cases is voluminous, so here I will only briefly summarize the salient points, with a focus on the particular inadequacies for acquaintance rape. The Department of Justice estimates that one million women are raped in the United States each year,<sup>43</sup> but only 2 to 4 percent of rapists are convicted.<sup>44</sup> Eighty percent of all rapes are acquaintance rapes.<sup>45</sup> There is a scholarly consensus that the criminal justice system is “reasonably capable” of handling “‘aggravated’ rapes, defined as rapes by strangers, or men with weapons, or where the survivor suffers ulterior injuries.”<sup>46</sup> Scholars likewise agree the criminal justice system is poorly equipped to handle cases involving “rapes by unarmed acquaintances (dates, lovers, neighbors, co-workers, employers, and so on) and in which the survivor suffers no additional injuries.”<sup>47</sup> This deficit of justice is caused by deep-seated problems in the criminal justice system.<sup>48</sup> Present obstacles include:<sup>49</sup> (1) failure of acquaintance rape survivors to report their injuries to the police, (2) discriminatory use of police discretion, (3) discriminatory use of prosecutorial discretion, (4) juror discrimination, and (5) lack of corroborating evidence.<sup>50</sup> After considering each obstacle in turn, I argue that while the first four obstacles could be remedied through legal or social reform, lack of corroborating evidence may

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<sup>43</sup> See DEAN G. KILPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 2 (2007), available at [www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf).

<sup>44</sup> Kim, *supra* note 13, at 272 (“Rape and sexual assault are the crimes with the lowest reported arrest and prosecution rate in the United States.”).

<sup>45</sup> LINDA A. MOONEY, DAVID KNOX & CAROLINE SCHACHT, UNDERSTANDING SOCIAL PROBLEMS 120 (7th ed. 2010).

<sup>46</sup> David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 318 (2000).

<sup>47</sup> *Id.* Feminist legal scholar Susan Estrich refers to what I term “acquaintance rape” as “simple rape.” Corey Rayburn, *To Catch A Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 438 (2006). Even Congress, a body hardly prone to reach an easy consensus, concluded after years of hearings that “bias and discrimination in the [state] criminal justice system often deprive survivors of violence motivated by gender of equal protection of the law.” H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.).

<sup>48</sup> Brief of Law Professors as Amici Curiae in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1032805 at \*23, available at <http://womhist.alexanderstreet.com/vawa/doc18.htm> (describing the “ongoing, pervasive and deeply entrenched pattern of official state action” preventing the criminal justice system from effectively deterring or punishing crimes against women).

<sup>49</sup> A comprehensive discussion of obstacles to effective criminal justice for rape is beyond the scope or purpose of this paper.

<sup>50</sup> The Senate Report on the passage of the Violence Against Women Act described the status of criminal justice for survivors of violence against women in stark terms: “Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against survivors on evidentiary matters; and juries too often focus on behavior of the survivors—laying blame on the survivors instead of on the attackers.” S. REP. NO. 102-197, at 34 (1991).



remain an insurmountable obstacle to obtaining convictions for the most prevalent form of rape: acquaintance rape. Furthermore, I argue that while criminal justice reform remains imperative, the particular characteristics of the criminal justice system make it ill-suited for meeting the goals of many rape survivors.

Many rape survivors do not report the crime to the police. Of the survivors who do report, some ultimately choose not to cooperate with a criminal prosecution. Only sixteen percent of rape survivors report the crime to the police, making rape “the violent crime *least likely* to be reported.”<sup>51</sup> A survivor’s reluctance to report may be caused by a desire for privacy, fear of perpetrator reprisal, a desire to protect the perpetrator, a reluctance to recognize her experience as rape,<sup>52</sup> or fear that her complaint will not be believed or not taken seriously by hostile or biased police officers.<sup>53</sup>

Police departments and prosecutors discriminate against rape complaints. Police departments are entrusted with great discretion in determining the merits of criminal complaints.<sup>54</sup> When utilizing their discretion many police departments continue to account for factors that are no longer relevant under the law, such as sex role and gender norms, promptness of complaint,<sup>55</sup> and the nature of the survivor’s relationship with the accused.<sup>56</sup> Claiming rape investigations are “difficult,” police departments disproportionately categorize rape complaints as unfounded or non-criminal.<sup>57</sup> Prose-

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<sup>51</sup> 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 (2001) [hereinafter Anderson, *Women Do Not Report*].

<sup>52</sup> Kerry M. Hodak, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089, 1092 n.14 (2004); Bryden, *supra* note 46, at 318.

<sup>53</sup> Anderson, *Women Do Not Report*, *supra* note 51, at 935–36. Survivors often take time to come to terms with the rape and gather the courage to report the crime. Survivors are sometimes disbelieved for acting inconsistently with society’s view of how a rape survivor “should act.” See, e.g., 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, 65 n.54 (2006) (citing *Commonwealth v. Neuntyer*, 731 N.E.2d 1053, 1060 (Mass. 2000)), which held that the fact the survivor spent the night with the defendant less than a week after the alleged rape occurred “*must call into question the validity of the report of rape.*”)

<sup>54</sup> Anderson, *Women Do Not Report*, *supra* note 51, at 928. Police officers’ normative values and personal biases inform their decisions as to the relevance of evidence, the credibility of witnesses, the selection of appropriate procedure, and, ultimately, the merits of the complaint. *Id.*

<sup>55</sup> Most states consider the timeliness of the complaint admissible to attack or bolster the credibility of the survivor. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions On Campus Sexual Assault*, 84 B.U. L. REV. 945, 967–68 (2004) [hereinafter Anderson, *The Legacy*].

<sup>56</sup> Anderson, *Women Do Not Report*, *supra* note 51, at 931.

<sup>57</sup> *Id.* at 929. The Philadelphia police admitted to categorizing 400 rape cases each year as “non-criminal” because the police found the cases to be “difficult.” *Id.* Practices like these allow cities to underreport their rape rates. *Id.* In the past decade, Philadelphia identified 18% of rape allegations as unfounded and 30% of rape complaints as non-criminal. *Id.* at 930. In other cities, the percentage of rape complaints eventually catego-

cutors likewise are entrusted with great discretion in determining which of the criminal complaints the police categorized as “founded” will be prosecuted.<sup>58</sup> Prosecutors disproportionately dismiss rape cases,<sup>59</sup> with dismissals occurring at twice the rate of murder cases.<sup>60</sup> District attorneys’ offices, like police departments, find failure to promptly report a rape to be evidence of fabrication.<sup>61</sup>

Jurors discriminate against rape survivors. Unlike nearly every other crime, most rape cases that proceed to trial result in acquittal.<sup>62</sup> For the small proportion of rape cases that proceed to jury verdict, it is not easy to ascribe an acquittal to any single factor, but jurors are influenced by societal gender and rape stereotypes,<sup>63</sup> as well as the press’s focus on gruesome stranger rapes to the exclusion of the more common phenomenon of acquaintance rape.<sup>64</sup> Jurors have a tendency to focus on irrelevant details about the survivor’s life such as her clothing, lifestyle, or demeanor.<sup>65</sup> Jurors tend to view with hostility rape survivors who drank, wore seductive clothing, or accepted a ride with the offender.<sup>66</sup>

Because acquaintance rape cases are especially likely to lack corroborating evidence, they are uniquely disadvantaged in the criminal justice system. A lack of corroborating evidence exacerbates each of the aforementioned obstacles. Rape survivors who have no corroborating evidence are less likely to make criminal complaints, perhaps because they feel less likely to be believed.<sup>67</sup> Police officers are more likely to categorize a complaint as

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rized as unfounded is similarly startling: 50% in Virginia Beach, 40% in Milwaukee, and 25% in Oakland. *Id.* Vocalized skepticism from the police on the likely failure of a criminal prosecution is powerfully persuasive to convince a survivor not to proceed further with her complaint. *Id.*

<sup>58</sup> *Id.* at 932.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* A seventeen-month study of two district attorney offices revealed that prosecutors are particularly likely to dismiss acquaintance rape cases, cases in which the survivor deviated from a female behavioral norm, or cases lacking corroborating evidence. *Id.* at 933.

<sup>61</sup> *Id.* at 934. One district attorney commented that a complainant who had actually been raped would not wait four hours to report the offense. *Id.*

<sup>62</sup> Hodak, *supra* note 52, at 1098.

<sup>63</sup> *Id.* at 1096.

<sup>64</sup> *Id.* at 1097; Rayburn, *supra* note 47, at 472 (“A jury who hears about a run-of-the-mill simple rape where the accuser was intoxicated is likely to shrug at the details of the complainant’s story. The jurors have heard it all before, but with more shocking details, more horrifying tidbits, and, if through movie or television, with an accompanying audio/video record.”).

<sup>65</sup> Kathryn M. Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN’S L. REV. 315, 346–47 (2001).

<sup>66</sup> *Id.*

<sup>67</sup> Rape survivors tend to only report “dead bang” or slam-dunk cases where they believe the likelihood of conviction is high. Anderson, *Women Do Not Report*, *supra* note 51, at 937. This trend disproportionately discourages survivors of acquaintance rape from turning to the criminal justice system. *Id.*

“unfounded” where there is no corroborating evidence.<sup>68</sup> Prosecutors are more likely to dismiss a case where there is no corroborating evidence.<sup>69</sup> Juries are more likely to acquit in rape cases lacking corroborating evidence.<sup>70</sup>

The persistent lack of corroborating evidence coupled with a high burden of proof makes convictions particularly unlikely in acquaintance rape cases. Historically, a mistrust of rape complainants motivated states to create statutory requirements for independent corroborating evidence.<sup>71</sup> Due to arduous criminal evidence reform, sexual assault statutes typically no longer require independent corroboration,<sup>72</sup> but juries continue to insist on such corroboration before convicting.<sup>73</sup> The Model Penal Code justifies its advocacy for an independent corroboration requirement for sexual felony convictions based on the unique nature of sexual offenses.<sup>74</sup> The Model Penal Code Commentary states, “In no other context is felony liability premised on conduct that under other circumstances may be welcomed by the survivor. . . . the corroboration requirement . . . [is not] an effort to discount female testimony. . . [but only] a particular implementation of the general policy that uncertainty should be resolved in favor of the accused.”<sup>75</sup> The Commentary thus raises the possibility that even absent a statutory requirement the unique

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<sup>68</sup> An audit of 2,368 Chicago complaints marked as unfounded revealed that rape complaints are especially likely to be categorized as unfounded because of lack of corroborative evidence. *Id.* at 930.

<sup>69</sup> *Id.* at 934. One district attorney admitted she would never initiate a rape prosecution where there is no corroborative evidence other than the testimony of the survivor. *Id.*

<sup>70</sup> This reluctance to convict could be attributable either to juror bias against acquaintance rape cases or merely to the high burden of proof. The Model Penal Code prohibits a conviction for a felony sexual offense without corroborating evidence. Anderson, *Women Do Not Report*, *supra* note 51, at 948 (citing Model Penal Code § 213.6 cmt. 6 (1980)). The only other crime the Model Penal Code requires corroborating evidence for is perjury, “particularly revealing of the Model Penal Code’s concern that women falsely claim rape.” *Id.* at 962–63 (citing Model Penal Code § 241.1(6) (1985)). Unsurprisingly, the “liberation hypothesis,” that juror bias is more salient when the prosecution’s case is weak, has been confirmed by empirical study. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1260 (1997). For example, the weaker the prosecution’s case is, the more influential racial or employment characteristics of the defendant are upon the verdict. *Id.* When the prosecution’s case is strong, employment characteristics of the defendant have been found to have no effect on the jury’s verdict. *Id.* Analogously, a jury is less likely to manifest its bias against rape survivors in acquittal when the prosecution has corroborating evidence. *Id.* Lack of corroborating evidence in rape cases thus exacerbates juror bias.

<sup>71</sup> See generally Anderson, *The Legacy*, *supra* note 55.

<sup>72</sup> *Id.* at 968 (“[T]he corroboration requirement has also been almost eradicated from formal rape law. Only three states—New York, Ohio, and Texas—continue to impose a corroboration requirement in their criminal codes for certain sexual offenses.”).

<sup>73</sup> Bryden, *supra* note 46, at 431 (“[I]t is the typical jury, not the law, that insists on corroboration.”). Reformers believed that if the requirement of independent corroboration was removed, jurors would be less hesitant to convict, but there has been little change for the “reporting, processing, and conviction rates in rape cases.” *Id.* at 320.

<sup>74</sup> Anderson, *The Legacy*, *supra* note 55, at 960–64.

<sup>75</sup> Model Penal Code § 213.6 cmt. 6 (1980).

nature of acquaintance rape makes corroborating evidence vital to extinguishing reasonable doubt.

Michelle Anderson, a prolific scholar analyzing the inadequacies of the criminal justice system to address acquaintance rape, assumes that jurors' demand for independent corroboration is wholly attributable to bias against rape complainants.<sup>76</sup> Anderson, like most feminist scholars, does not acknowledge that the particularly private nature of acquaintance rape may much more frequently than other crimes leave jurors with lingering doubts.<sup>77</sup> Feminist scholars are correct to criticize statutory corroboration requirements as demonstrative of prejudice against rape survivors. But the harder question is whether the particularities of the crime of acquaintance rape would lead even genuinely unbiased jurors to frequently require corroboration before finding guilt beyond all reasonable doubt. While this is a worthy question for further empirical study and analysis, jurors presently demand more corroboration than the State can provide in acquaintance rape cases. Thus, the lack of corroborating evidence may well prove an intractable obstacle to criminal justice for acquaintance rape victims.

The criminal justice system's notorious failure to prosecute acquaintance rapists and prosecutors' enduring inability to meet their burden of proof underscore the importance of making other legal avenues available to acquaintance rape survivors. Therefore, a truly comprehensive approach to deterring and punishing acquaintance rape and providing justice for acquaintance rape survivors should also look beyond the confines of the criminal justice system.

### *C. Civil Remedies as an Avenue for Rape Deterrence and Survivor Recovery*

Modern policy theorists, lawyers, judges, politicians, and academics all acknowledge that the civil justice system, like the criminal justice system, is capable of serving as a vehicle for the "enforcement of public norms."<sup>78</sup> While not a replacement for criminal actions, civil remedies offer a crucial alternative (or complementary) avenue for rape deterrence and punishment because civil remedies provide a solution to many of the problems outlined above. Civil remedies provide advantages such as: (1) a lower burden of proof and less specific elements to prove, (2) a more even distribution of

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<sup>76</sup> See, e.g., Anderson, *Diminishing the Legal Impact*, *supra* note 23, at 649.

<sup>77</sup> See generally *id.*; Bryden, *supra* note 46; Dana Vetterhoffer, *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 ST. LOUIS U. L.J. 1229, 1230 (2005) (arguing the corroboration requirement is an example of sexist standards imposed by men). Catharine MacKinnon, for example, views corroboration requirements for rape as contributing to women's legalized subordination. See CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 164 (2005).

<sup>78</sup> Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144-45 (2000).

rights and benefits between the parties, (3) greater survivor control over the course and resolution of the litigation, and (4) monetary damages for the survivor. As such, civil litigation is better suited to meet survivors' goals of financial restitution and autonomy over the litigation process. Furthermore, the particular advantages of civil litigation sometimes allow survivors to succeed where criminal complaints or prosecutions have failed.<sup>79</sup>

A plaintiff has a lower burden of proof and needs to prove her case with less specificity than the prosecution does in a criminal case. An oft-cited advantage to civil litigation is the fact that the burden of proof for the prosecution in a criminal case is "proof beyond a reasonable doubt" while the burden of proof in a civil case is proof by "a preponderance of the evidence."<sup>80</sup> A defendant who is acquitted or even fails to be indicted in a criminal case may be found liable in a civil case by reasonable jurors without any additional evidence.<sup>81</sup> Rape survivors may sue for damages under

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<sup>79</sup> In the few civil rape cases that proceed to trial, monetary judgments are not uncommon even where evidence is insufficient to prove guilt beyond a reasonable doubt. For example, in *Weldon v. Rivera*, a plaintiff succeeded in recovering damages for a claim where the defendant, Gilbert Rivera, had sexual intercourse with her despite her verbal objection and despite the fact she was so intoxicated with alcohol that she was passing in and out of consciousness. Bublick, *supra* note 53, at 64 (citing *Weldon v. Rivera*, 301 A.D.2d 934 (N.Y. App. Div. 2003)). The plaintiff also succeeded in obtaining a judgment against the defendant's friend, who kissed the plaintiff while watching the defendant commit the rape and encouraged the plaintiff to continue consuming alcohol even after she was intoxicated. *Id.* The judgment was upheld on appeal. *Id.* Rape survivors may succeed in civil suits even where criminal complaints or criminal prosecutions have come to no avail. For example, Jeanne Tolle obtained a multimillion-dollar judgment against a rapist when the police refused to take action. Jeanne Tolle was repeatedly raped by her father, Robert Tolle, as a child and young teenager. She reported the sexual abuse to a Florida police department in 1973 at age fourteen. The police department failed to arrest Ms. Tolle's father or conduct a thorough investigation. Ms. Tolle was unable to locate her father from 1973 until 2001. She called the Florida police department where she made her report every few years for twenty-eight years hoping to incentivize the police to take action. After she located her father in 2001, she initiated a civil suit against him in a Florida court. Ms. Tolle obtained a judgment against her father for \$1.7 million dollars. Her father died in 2002 before he could appeal the judgment. Appellee's Responsive Brief, *Tolle v. Fenley*, 132 P.3d 63 (Utah Ct. App. 2006) (No. 20041045), 2005 WL 5612526, at \*5 [hereinafter Appellee's Responsive Brief]; see Susan Clary, *30 Years Pass Before Dad Indicted In Rapes*, ORLANDO SENTINEL, February 17, 2002, available at [http://articles.orlandosentinel.com/2002-02-17/news/0202170042\\_1\\_tolle-sheriff-office-jeanne](http://articles.orlandosentinel.com/2002-02-17/news/0202170042_1_tolle-sheriff-office-jeanne). In *St. Paul Fire & Marine Insurance Co. v. Engelmann*, a woman sued her doctor for raping her while claiming to perform a pelvic exam. Bublick, *supra* note 53, at 64 (citing *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192 (S.D. 2002)). Three other women came forward after she did with similar allegations. *Id.* The doctor was acquitted in a criminal trial, but as a result of the tort action a jury awarded each survivor \$450,000 in damages. *Id.* The award was upheld on appeal. *Id.*

<sup>80</sup> Bublick, *supra* note 53, at 68.

<sup>81</sup> In jurisdictions where collateral estoppel provisions permit, rape survivors suing defendants who have been convicted or pled guilty in a criminal action need not litigate the issue of tort liability in a civil trial at all and may proceed directly to litigate the question of damages. *Id.* at 70. For example, in *Doe v. Keller*, a man who was attacked by his roommates succeeded in a civil case in front of a district judge even where a grand jury failed to indict the roommates because of lack of probable cause. *Id.* at 68 n.80. The Massachusetts appeals court upheld the judgment. The question before the grand jury was

general tort causes of action such as battery. To prevail, a battery plaintiff need only prove “(1) that the defendant touched the plaintiff; (2) that the defendant intended to touch the plaintiff; and (3) that the touching was conducted in a harmful or offensive manner.”<sup>82</sup> In a criminal case, however, the prosecution bears the burden of proving “insufferable details about exactly which digit touched which orifice” to establish the specific offense committed.<sup>83</sup> The lower evidentiary burden and decreased specificity of elements may provide survivors with a chance of success that they would not have in criminal actions.

Civil actions allow for a more even distribution of rights and procedural benefits between the parties. In civil cases defendants have fewer constitutional protections.<sup>84</sup> In tort, plaintiffs can discover or compel the defendant’s testimony, and the jury is permitted to draw an adverse inference from a defendant’s refusal to testify.<sup>85</sup> Conversely, in criminal prosecutions the defendant has a Fifth Amendment privilege against self-incrimination and may refuse to testify, and the jury is not permitted to draw an adverse inference from his refusal.<sup>86</sup> In criminal actions, defendants generally have counsel, but survivors do not.<sup>87</sup> There is no person designated to represent the interests of the survivor in the criminal justice system. In civil actions, defendants, like plaintiffs, are not entitled to free legal counsel.<sup>88</sup> The unavailability of free legal representation for tort places strong financial pressure on both parties to settle before trial.<sup>89</sup>

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whether there was probable cause to believe that the roommates had raped the plaintiff. The question before the district judge was whether, based upon a preponderance of the evidence, there was a continuing need for a restraining order under the G.L. c. 209A. Different questions may result, as they did here, in different answers. *Id.* (citing *Doe v. Keller*, 786 N.E.2d 422 (Mass. App. Ct. 2003)).

<sup>82</sup> *Ex parte Atmore Cmty. Hosp.*, 70 So. 2d 1190, 1193 (Ala. 1998).

<sup>83</sup> *Bublick*, *supra* note 53, at 72. In *State v. Flynn*, the Supreme Court of New Hampshire held that whether the defendant’s finger touched outside or inside her vagina was crucial to establishing whether the defendant had committed the crime of aggravated sexual assault. *Id.* at 73 n. 114 (citing 855 A.2d 1254, 1260–63 (N.H. 2004)). While the intent element is present in both criminal and civil law, in civil law, the survivor need only show an “actual intent to harm or offend” rather than a specific intent to have nonconsensual sex. *Id.* at 73.

<sup>84</sup> *See id.* at 69 (“In tort cases, the constitutional rights of defendants are rarely at issue.”).

<sup>85</sup> *Id.*

<sup>86</sup> *See* U.S. CONST. amend. V; Martin D. Litt, *Commentary by Co-Defendant’s Counsel on Defendant’s Refusal to Testify: A Violation of the Privilege Against Self-Incrimination?*, 89 MICH. L. REV. 1008, 1008–09 (1991).

<sup>87</sup> *Bublick*, *supra* note 53, at 69.

<sup>88</sup> *Id.*

<sup>89</sup> *See id.* at 70. Because of the high cost of civil litigation, individual defendants are more likely than institutional defendants to settle prior to trial or before an appeal. *Id.* *See also* Ellen Bublick, *Civil Tort Actions Filed by Survivors of Sexual Assault: Promise and Perils*, NAT’L RESOURCE CTR. ON DOMESTIC VIOLENCE (Sept. 2009), available at [www.vawnet.org](http://www.vawnet.org) (“In a significant number of the 2000-2005 appellate court decisions in cases filed by sexual assault survivors, the survivor settled with the perpetrator before trial and proceeded with litigation only against the other party.”) [hereinafter *Bublick, Civil Tort Actions*].

Civil suits give survivors, rather than prosecutors, control over the cases. Because survivors assume the role of the plaintiff in tort actions, survivors have vastly greater control over civil suits than criminal prosecutions.<sup>90</sup> As plaintiffs, survivors may determine whether and when to dismiss or settle a suit.<sup>91</sup> In a criminal prosecution, police, prosecutors, and judges are all tasked with considering the “safety and welfare” of the survivor, but no party is responsible for advocating on behalf of the survivor’s interests.<sup>92</sup> If a survivor even inadvertently discloses any exculpatory evidence to a prosecutor, the prosecutor is charged with a duty to disclose the information to the defendant.<sup>93</sup> Law enforcement personnel cannot prioritize survivors’ interests because their duty is to represent the interest of the state.<sup>94</sup>

Because of the particular nature of the crime of rape—a theft of the autonomy of the survivor—it is particularly important for a survivor to retain autonomy over her recovery.<sup>95</sup> Plaintiffs’ attorneys are duty-bound to represent the interests of the plaintiff and have both “the professional freedom” and “the ethical duty” to “empower the client to make her own choices, and to facilitate whatever action (or inaction) the victim chooses.”<sup>96</sup> In a civil suit, a survivor can bargain to drop her suit in exchange for the defendant’s promise to meet her demands. This is a sharp contrast to the criminal justice system, which is so hostile to a survivor’s interests that it is unethical for a prosecutor to suggest that the survivor drop criminal charges if her assailant satisfies her demands.<sup>97</sup>

Survivors are able to recover monetary damages through civil settlements or judgments. Monetary damage awards help achieve the “practical goal of more effectively redressing the economic harms resulting from abuse.”<sup>98</sup> Obtaining monetary damages also provides the positive psychological benefit of validating the survivor’s experience and reinforcing “the idea that perpetrators must be accountable for their actions.”<sup>99</sup> Both state and federal criminal statutes have restitution provisions that require convicted defendants to pay survivors compensation for their losses,<sup>100</sup> but only the

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<sup>90</sup> Bublick, *supra* note 53, at 73. Survivors can “shape the litigation to meet their personal objectives.” *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See Kanter, *supra* note 32, at 278. The interests of survivors often conflict with the state’s responsibilities, but there is no ethical justification for criminal justice professionals to prioritize the preferences of survivors. Indeed, the primary focus of a criminal prosecution is on “the criminal’s debt to society,” not the criminal’s debt to the survivor. *Id.*

<sup>93</sup> See Kanter, *supra* note 32, at 279.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (“[W]hat a rape victim[ ] needs most [is] control over her recovery after the assault.”).

<sup>96</sup> *Id.*

<sup>97</sup> Bublick, *supra* note 53, at 74.

<sup>98</sup> Goldscheid, *supra* note 17, at 733.

<sup>99</sup> *Civil Remedies*, THE ADVOCATES FOR HUMAN RIGHTS (Feb. 10, 2009), [http://stopvaw.org/Civil\\_Remedies.html](http://stopvaw.org/Civil_Remedies.html).

<sup>100</sup> Goldscheid, *supra* note 17, at 772.

minority of rape survivors whose attackers are actually convicted receive financial compensation through such provisions.<sup>101</sup> Crime Survivor Compensation Boards can help make survivors financially whole without the exacting toll of litigation, but the average survivor receives only \$2,000,<sup>102</sup> whereas the estimated cost of the rape to the survivor is near \$100,000.<sup>103</sup> Furthermore, government provision of benefits for rape survivors does little to help deter or punish rape or provide the survivor with a sense of justice.

Some individual rape defendants have sufficient assets or income from which to pay a judgment or settlement.<sup>104</sup> Because the future wages of a defendant may be garnished to pay the debt, survivors may obtain sizeable settlements or judgments even from defendants who are not wealthy.<sup>105</sup> Even modest damages from a low-income defendant for lost wages or counseling fees validate the survivor's experience, help her pay her bills, and deter further tortious conduct by the defendant.<sup>106</sup> Even civil suits against truly judgment-proof defendants can help achieve important non-monetary objectives like an apology or the perpetrator's transfer to a different school, apartment complex, or job.<sup>107</sup> Civil rape suits may also be aimed at third party defendants.<sup>108</sup> In fact, as will be discussed in detail in Part II.D.4, recent appellate court opinions indicate that the vast majority of civil rape suits are against third party defendants, such as "employers, businesses, schools, nursing homes, foster parents, and other entities."<sup>109</sup> Plaintiffs have had marked success in obtaining sizeable settlements and judgments against third party defendants.<sup>110</sup>

#### D. *Survey of Available State Civil Remedies for Rape Survivors*

The attorneys general of forty-one states supported VAWA's federal civil remedy and feminists were united in support of the remedy.<sup>111</sup> It is

<sup>101</sup> Where a defendant is not convicted of a crime, the court ipso facto cannot order the defendant to pay restitution, and only a small minority of rapists are convicted. *See supra* note 13, and accompanying text.

<sup>102</sup> Easton, *supra* note 30, at 38–39.

<sup>103</sup> *See* Lininger, *supra* note 18, at 1574 n.84 (citing the average cost of a rape in 1996 as \$87,000).

<sup>104</sup> Bublick, *supra* note 53, at 73–74; Letter from Kaethe Morris Hoffer, Attorney, Survivor Advocate, & Specialist in the Illinois Gender Violence Act, in Chicago, Ill. (Mar. 29, 2011) (on file with author).

<sup>105</sup> *See* Bublick, *supra* note 53, at 74 n.120 (citing cases in which wages of defendants were garnished to pay damages).

<sup>106</sup> *See* Lininger, *supra* note 18, at 1574 n.85.

<sup>107</sup> Bublick, *supra* note 53, at 74.

<sup>108</sup> *See, e.g.,* Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70 (La. Ct. App. 1989) (upholding a \$180,000 judgment for a 13-year-old rape survivor in a suit against a rapist, the rapist's parents, and a park to reimburse the survivor for out-patient psychiatric treatment, embarrassment, and humiliation).

<sup>109</sup> Bublick, *supra* note 53, at 57.

<sup>110</sup> *See infra* Part II.D.4.

<sup>111</sup> Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 85 (2002) ("Forty-one attorneys



therefore surprising that in the wake of *Morrison*, few states passed state legislation modeled after the federal remedy or otherwise expended resources to encourage survivors of gender violence to pursue civil suits under state remedies. Nonetheless, the number of civil suits by rape survivors has in fact increased in the years following *Morrison*. Because few survivors utilized VAWA's civil remedy, *Morrison* had little effect on the overall number of civil suits brought by survivors. In 1991, in the Senate Committee on the Judiciary's discussion of VAWA, it was reported that "less than 1 percent of all [rape] survivors have collected damages."<sup>112</sup> In 1999, only 500 sexual assault survivors nationwide filed civil lawsuits against their assailants, the vast majority of which were brought in state court.<sup>113</sup> In the years following *Morrison*, researchers estimated that annual civil tort actions filed by survivors of sexual assault actually increased and numbered in the thousands,<sup>114</sup> but the proportion of total rape survivors who choose to file civil suits remains "alarmingly low."<sup>115</sup>

A survey of state civil remedies reveals three primary categories of remedy: (1) civil causes of action mirrored after the VAWA federal remedy, (2) civil rights statutes encompassing gender violence, and (3) traditional tort. Under the latter two regimes, civil suits against third party defendants have become more common than suits against individual alleged assailants.<sup>116</sup> The following discussion notes the strengths and weaknesses of each type of remedy, and concludes that all of the remedies are underutilized. I next explore the most common form of lawsuits by rape survivors: lawsuits against third party defendants. I conclude that the insurance market and the financial incentives of the plaintiffs' bar largely explain why the large majority of civil suits by rape survivors are brought against third party defendants.

### 1. *The "VAWA Model" Statutes*

Despite the scale of press and support that the VAWA federal remedy garnered, after *Morrison* there was comparatively little advocacy to pass analogous state remedies. Only California, Illinois, New York City, and Westchester County, New York have created civil causes of action modeled after the federal VAWA remedy.<sup>117</sup> Arizona, Arkansas, and New York pro-

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general signed a letter to Congress urging the enactment of VAWA in general and the civil rights provision in particular."); Lininger, *supra* note 18, at 1572 ("A total of thirty-six state attorneys general and a large group of feminist organizations filed amicus briefs to save the civil remedy.").

<sup>112</sup> S. REP. NO. 102-197, at 44 (1991).

<sup>113</sup> Lininger, *supra* note 18, at 1568-69 n.47.

<sup>114</sup> Bublick, *Civil Tort Actions*, *supra* note 89.

<sup>115</sup> See Lininger, *supra* note 18, at 1615.

<sup>116</sup> Bublick, *supra* note 53, at 57.

<sup>117</sup> Goldscheid, *supra* note 17, at 754; see also Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 265 n.205 (2009) (citing CAL. CIV. CODE § 52.4 (West 2009) (permitting survivors of gender vio-

posed VAWA model statutes,<sup>118</sup> but to date those initiatives have failed to pass. These state and local statutes provide “nearly identical substantive relief” with “similar elements of proof” to the VAWA federal remedy.<sup>119</sup> Statutes modeled after the VAWA federal remedy provide advantages not typically found in traditional tort actions: (1) they award attorney’s fees and costs to a prevailing plaintiff, and (2) they provide an extended statute of limitations.<sup>120</sup> All the model statutes provide for punitive damages, and injunctive and declaratory relief.<sup>121</sup> Like the federal remedy, they do not authorize suits against third party defendants, but third party suits may still be pursued under traditional negligence causes of action.<sup>122</sup>

Compared to the federal VAWA remedy, the passage of these statutes received little public attention.<sup>123</sup> For example, the California statute passed easily but was criticized by some in the California legal community as unnecessary.<sup>124</sup> Commentators note that these statutes, like the federal VAWA remedy that was used in fewer than ten reported decisions each year, are used infrequently.<sup>125</sup> As of 2006, no reported decisions had discussed the substance of these laws, although a couple of reported decisions have evalu-

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lence to seek actual, compensatory, and punitive damages, injunctive relief, or any combination thereof); 740 ILL. COMP. STAT. ANN. 82/10 (LEXIS 2004) (permitting individuals subjected to gender-related violence to bring civil actions for damages, injunctive relief, or other appropriate relief against their abusers); N.Y. CITY ADMIN. CODE § 8-902–907 (LEXIS 2007) (creating a private right of action for survivors to seek redress for their injuries from their perpetrator); WESTCHESTER CNTY., N.Y., VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION ch. 701.01 (2001) (providing domestic violence survivors with a private right of action against their abusers as an exercise of the state’s police power)).

<sup>118</sup> Joy M. Feinberg, *The Impact of Domestic Violence on Property Division in Divorce in the U.S.A.*, available at <http://www.feinbergbarry.com/pubarticles-violence.htm> (citing Violence Motivated by Gender, S.B. 1550, 45th Leg., 1st Reg. Sess. (Ariz. 2001)); Arkansas Violence Against Women Act of 2001, H.B. 1691, 83d Gen. Assem., Reg. Sess. (Ark. 2001); An Act To Amend the Civil Rights Law, in Relation to Providing a Civil Remedy for Survivors of Bias-Related Violence or Intimidation, S.B. 2776, 224th Leg., Reg. Sess. (N.Y. 2001).

<sup>119</sup> Goldscheid, *supra* note 17, at 754.

<sup>120</sup> The New York City and Illinois statutes even provide a generous statute of limitations of seven years. N.Y. CITY ADMIN. CODE § 8-905 (LEXIS 2007); 740 ILL. COMP. STAT. ANN. 82/20 (LEXIS 2004).

<sup>121</sup> See Dragiewicz & Lindgren, *supra* note 117, at 229.

<sup>122</sup> The VAWA federal remedy was not interpreted to allow suits against third party defendants, and the state statutes modeled after the VAWA remedy expressly disallow suits against third party defendants under the cause of action. See, e.g., Corinne Casarino, Note, *Civil Remedies In Acquaintance Rape Cases*, 6 B.U. PUB. INT. L.J. 185, 192–93 (1996); N.Y. CITY ADMIN. CODE §§ 8-902–8-907 (LEXIS 2007); 740 ILL. COMP. STAT. ANN. 82/10 (LEXIS 2004); CAL. CIV. CODE § 52.4(d) (West 2009). I discuss the importance of third party suits at length *infra* Part II.D.4.

<sup>123</sup> Goldscheid, *supra* note 17, at 754.

<sup>124</sup> See Bill Diedrich, *Chapter 842: Another Remedy For Survivors Of Gender-Related Violence—Is This Too Much Of A Good Thing?*, 34 McGEORGE L. REV. 333, 337 (2003).

<sup>125</sup> See Regan, *supra* note 11 (describing VAWA as referenced in more journal articles than court cases).

ated procedural issues.<sup>126</sup> In Illinois, one plaintiff initially obtained a much-publicized \$2.4 million award from a Cook County circuit judge under the Illinois Gender Violence Act,<sup>127</sup> but an appellate court overturned it on technical grounds for incorrect service of process.<sup>128</sup> The state remedies modeled after the VAWA remedy are both rarely used by survivors and rarely written about in the popular press or academic scholarship.

## 2. *General Civil Rights Statutes*

Eleven states and the District of Columbia have civil causes of action for “gender” or “sex” bias.<sup>129</sup> This form of remedy is analogous to civil remedies for hate crimes. Some of the state civil rights statutes allow for a broader cause of action than the VAWA federal remedy or the VAWA model state statutes.<sup>130</sup> For example, under the Nebraska statute a plaintiff need not have been the survivor of a violent crime to sue: survivors of “criminal mischief,” “unauthorized application of graffiti,” or “criminal trespass” are also eligible to use the cause of action.<sup>131</sup>

In 2001, in *Zenobile v. McKecuen*, the Court of Appeals of North Carolina held that under North Carolina General Statute § 99D-1, the appellant had stated a claim sufficient to survive a motion to dismiss against a conspirator in her sexual assault.<sup>132</sup>

G.S. § 99D-1 provides a civil cause of action where two or more persons, motivated by gender, conspire to interfere with the exercise or enjoyment by any other person of a constitutional right, and where one or more persons engaged in the conspiracy, in order to commit any act in furtherance of the conspiracy, uses force, repeated harassment, violence, physical harm, or threats of physical harm.<sup>133</sup>

The plaintiff alleged the defendant mixed the alcoholic drinks that rendered the plaintiff unconscious, was present when the plaintiff was stripped naked,

<sup>126</sup> Goldscheid, *supra* note 17, at 754–55.

<sup>127</sup> Jackie Fitzpatrick, *Scientific Methods: Karn '03 Wins Large Award Under Illinois Gender Violence Act*, 13 QUINNIPIAC U. SCH. OF L. MAG. 16, 16 (2007).

<sup>128</sup> Hoffer, *supra* note 104. The plaintiff re-served the defendant and the case settled. *Id.*

<sup>129</sup> Goldscheid, *supra* note 17, at 755 (citing CAL. CIV. CODE § 52.4 (West 2004); D.C. CODE ANN. § 22-3704 (2004); 720 ILL. COMP. STAT. ANN. 5/12-7.1(a), (c) (West 2004); IOWA CODE ANN. §§ 729A.2, 729A.5 (West 2004); MASS. GEN. LAWS ANN. ch.12, §§ 11H, I (West 2004); MICH. COMP. LAWS ANN. § 750.147b (2004); MINN. STAT. ANN. § 611A.79 (2004); NEB. REV. STAT. § 28-113 (2004); N.J. STAT. ANN. § 2A:53A-21 (West 2004); N.C. GEN. STAT. § 99D-1(b) (2004); RI. GEN. LAWS § 9-1-2 (2004); VT. STAT. ANN. tit. 13, §§ 1455(a), 1457 (2004); WASH. REV. CODE ANN. § 9A.36.083 (West 2004)).

<sup>130</sup> See Goldschie, *supra* note 17, at 755.

<sup>131</sup> NEB. REV. STAT. § 28-111 (2004).

<sup>132</sup> 548 S.E.2d 756, 760 (N.C. Ct. App. 2001).

<sup>133</sup> *Id.*

and stated to the assailant, “It’s all yours” and “I’ve got money riding on it.”<sup>134</sup> The Court of Appeals overturned the trial court’s decision to grant a motion to dismiss for failure to state a claim under the statute.<sup>135</sup> While the plaintiff in *Zenobile* succeeded under the statute, the cause of action is limited to conspiracies, a much narrower cause of action than the VAWA model provided. Because a single model did not inspire the civil rights statutes, some of the civil rights state statutes have much broader coverage than the VAWA statute and others, like North Carolina’s, have more limited applicability.

Although most of the civil rights statutes allow for attorneys’ fees, like the VAWA model statutes, the civil rights statutes are underutilized.<sup>136</sup> Of the few reported decisions involving these causes of action, most adjudicate procedural issues and few substantively analyze a gender bias claim.<sup>137</sup>

### 3. *Traditional Tort*

The common thread between both the civil rights statutes and the “VAWA model” statutes is a commitment to characterize gender-biased violence as a civil rights issue. Catharine MacKinnon launched a successful movement in the late 1970s to transform the law to address sexual harassment as a civil rights and equality issue.<sup>138</sup> The enormous success of this movement inspired equality activists to seek the same transformation for gender violence. The VAWA federal remedy was important for its symbolic no less than its practical importance as the first congressional declaration that there is a federal civil right to be free from gender violence.<sup>139</sup> As gender violence is so often misperceived as a private interpersonal problem, defining freedom from it as a civil right is important because it underscores its true nature as a “systematic, political problem” requiring a “systematic, political solution.”<sup>140</sup> Civil rights claims are also “intrinsically assertive” and express a plaintiff’s “demand to be heard.”<sup>141</sup> By asserting their right to be heard, equality activists countered the “customary view that survivors of domestic violence and rape should remain silent.”<sup>142</sup> The creation of a civil rights remedy for sex discrimination also helped counter views that “domestic or sexual violence is the survivor’s fault; that violence against women is a

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See Goldscheid, *supra* note 17, at 755.

<sup>137</sup> *Id.*

<sup>138</sup> See David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1701–02 (2002).

<sup>139</sup> See Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL’Y & L. 251, 252 (2003).

<sup>140</sup> *Id.* at 255.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

personal, private problem; and that the law and other institutions are justified in ignoring or condoning such behavior.”<sup>143</sup> The conceptualization of gender violence as a civil rights issue is the enduring legacy of the VAWA civil remedy.

Even so, traditional tort remedies offer some advantages worth considering. When a rape survivor sues under a traditional tort remedy such as battery, she only needs to prove that the defendant intentionally touched her in a harmful or offensive manner.<sup>144</sup> By creating innovative civil rights or tort remedies designed to offer special advantages to survivors of gender violence, states sometimes increase the specificity of the elements the plaintiff must prove, increasing her difficulty in meeting the burden of proof.<sup>145</sup> For example, a New Jersey statute that creates a specific civil action for sexual abuse imports the criminal law problem of excessive specificity.<sup>146</sup> The statute defines “sexual abuse” as an act of “sexual penetration” or “sexual contact.”<sup>147</sup> To prove “sexual contact” the plaintiff must prove the defendant intentionally touched the survivor’s intimate parts “for the purpose of sexually arousing or sexually gratifying the actor.”<sup>148</sup> To prove “sexual penetration” the plaintiff must prove that “vaginal intercourse, cunnilingus, fellatio or anal intercourse” occurred “between persons or insertion of the hand, finger or object into the anus or vagina either by the adult or upon the adult’s instruction.”<sup>149</sup> While New Jersey’s sexual abuse statute offers the benefit of a longer statute of limitations than traditional tort actions, the specificity of the tort makes it more difficult to prevail under than a traditional tort action. By substituting general language for specific language, specialized tort and civil rights statutes for sexual assault may unintentionally import problems inherent to criminal prosecutions.<sup>150</sup>

#### 4. *Civil Suits Against Third Party Defendants*

The majority of civil suits by rape survivors are not initiated against their assailants, but against third-party defendants.<sup>151</sup> The number of published cases addressing third party suits from 2003 to 2008 exceeded “by 2000 percent the number of published cases addressing third party suits in the early 1980s.”<sup>152</sup> The dynamics of the insurance market explain the popu-

<sup>143</sup> *Id.* at 255–56.

<sup>144</sup> See, e.g., *Harper v. Winston Cnty.*, 892 So. 2d 346, 353 (Ala. 2004) (“The plaintiff in an action alleging assault and battery must prove: (1) that the defendant touched the plaintiff; (2) that the defendant intended to touch the plaintiff; and (3) that the touching was conducted in a harmful or offensive manner.”) (internal citations omitted).

<sup>145</sup> *Bublick*, *supra* note 53, at 73.

<sup>146</sup> *Id.*

<sup>147</sup> N.J. STAT. ANN. § 2A:61B-1 (West 2005).

<sup>148</sup> § 2A:61B-1(2).

<sup>149</sup> § 2A:61B-1(3).

<sup>150</sup> *Bublick*, *supra* note 53, at 73.

<sup>151</sup> *Id.* at 61.

<sup>152</sup> *Lininger*, *supra* note 18, at 1571.

larity of third party civil suits by rape survivors. Insurance policies rarely cover intentional torts, such as sexual assault.<sup>153</sup> Insurance companies do, however, aggressively market negligence insurance to landlords, employers, schools and other institutions.<sup>154</sup> Courts have consistently held for sexual assault claimants in coverage disputes over the negligent liability of these institutions for sexual assault.<sup>155</sup> Thus, suits against third party institutional defendants provide a larger and more certain reward than suits against individual defendants.

Civil suits against third party defendants also spur defendants to take precautionary measures to prevent future rapes and sexual assaults.<sup>156</sup> Through third party civil lawsuits rape survivors have succeeded in motivating apartment owners to improve security measures and motivating employers to perform more thorough background checks.<sup>157</sup> In *Kodiak Island Borough v. Roe*, the plaintiff was successful in obtaining damages against an Alaskan Borough for negligently hiring, at a Borough-run home, an employee with a criminal history of sexual misconduct to care for developmentally disabled patients.<sup>158</sup> In *Saine v. Comcast Cablevision of Arkansas, Inc.*, the Supreme Court of Arkansas denied Comcast's motion for summary judgment as to negligent supervision and retention where the defendant cable company retained an employee after receiving a complaint that he raped a customer during a previous home visit.<sup>159</sup>

The financial incentives of the plaintiffs' bar largely explain why third party civil suits have eclipsed suits against individual defendants. The availability of negligence insurance unsurprisingly makes third party civil suits attractive to plaintiffs' attorneys.<sup>160</sup> I hypothesize survivors have less trouble obtaining counsel in third party suits because deep-pocketed institutional defendants offer plaintiffs' attorneys a greater financial incentive to pursue a lawsuit.<sup>161</sup> A comprehensive state civil remedy for rape survivors should include third party negligence actions, but such third party lawsuits alone are insufficient to meet the civil justice needs of all rape survivors. Survivors who are raped because of institutional negligence will have access to counsel, but those who were raped in a more private interaction will not. At present, only a small percentage of tort cases filed by rape survivors fill a

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<sup>153</sup> *See id.* at 1573.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1565.

<sup>157</sup> *Id.*

<sup>158</sup> 63 P.3d 1009 (Alaska 2003).

<sup>159</sup> 126 S.W.3d 339 (Ark. 2002).

<sup>160</sup> Lininger, *supra* note 18, at 1573.

<sup>161</sup> *See id.* ("Third-party defendants often have substantial resources, allowing plaintiffs to recover damages for their injuries even when the alleged rapists themselves are 'judgment-proof.'").

direct “criminal-law-substitute” role by seeking to hold individual perpetrators accountable.<sup>162</sup>

Civil suits against third party defendants are not uncommon, but suits against individual defendants are extremely rare. We can do better than allowing the structure of the insurance market to dictate which rape survivors have access to civil justice and which do not. Many survivors desire to hold their assailants accountable.<sup>163</sup> Thus, third party civil suits by rape survivors should be seen as complementary to rather than as a substitute for suits against perpetrators. Rape survivors should also be financially enabled to sue individual assailants.

## II. COMPARING MODELS OF GOVERNMENT SUBSIDIZATION OF CIVIL SEXUAL ASSAULT CLAIMS

The survey of available remedies for acquaintance rape survivors reveals that all available civil remedies are vastly under-used by victims. The financial expense of litigation is a significant obstacle to the pursuit of civil remedies by rape victims.<sup>164</sup> Civil lawsuits are frequently cost prohibitive where the victim has to bear the full cost of litigation,<sup>165</sup> and because lawyers are unlikely to represent victims on a contingency fee basis unless there is a significant likelihood of recovery, rape victims have a particularly difficult time securing contingency fee representation.<sup>166</sup> Moreover, because restrictions on federal funds prohibit legal aid programs from litigating most tort cases, legal aid programs offer virtually no legal representation to sexual assault victims.<sup>167</sup>

This section explores state governments’ available modes of subsidizing civil suits: private attorney general provisions, civil Gideon provisions, and government agency enforcement actions. None of the available modes of government subsidization are ideal for encouraging civil claims by acquaintance rape survivors. Thus, I propose creating a survivor recovery subsidy fund to help fund civil suits by acquaintance rape survivors. After explaining the mechanics of my proposal, I conclude that the fund would be desirable both to acquaintance rape survivors and to the plaintiffs’ bar. Finally, I address constitutional, practical, and feminist objections to my proposal.

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<sup>162</sup> Bublick, *supra* note 53, at 63.

<sup>163</sup> See *supra* Part II.A.

<sup>164</sup> See Bublick, *supra* note 53, at 77.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

A. *Private Attorney General Provisions*1. *Theory*

The private attorney general model was developed for the purpose of spurring citizens to pursue civil suits beneficial to society at large.<sup>168</sup> The term “private attorney general” was first used over sixty years ago to denote a person using civil litigation to “vindicate public interests” unrelated to any injury he specifically received.<sup>169</sup> The concept, however, evolved much earlier. Fourteenth-century England developed *qui tam* statutes allowing private persons to sue for violations of civil statutes even if they had not been harmed by the violation.<sup>170</sup> *Qui tam* actions provided a percentage of the damages or civil penalties to the plaintiff as a reward for his troubles.<sup>171</sup> The longstanding legal tradition of statutory awards for private enforcement of public interests lends legitimacy to its modern day formulations.

Private citizens are currently authorized by statute to vindicate a multitude of public interests: antitrust provisions, environmental protections, civil rights, securities fraud, and consumer protections.<sup>172</sup> More than 150 federal and state civil statutes currently provide statutory fees to prevailing plaintiffs.<sup>173</sup> Modern policymakers have provided incentives for private attorneys general in these widespread contexts because of the distinct advantages of private enforcement. A frequently cited advantage of private enforcement is cost efficiency: “giving private parties a financial interest in enforcing public law is an efficient way to promote the public interest.”<sup>174</sup> Fee-shifting provisions allow the cost of enforcing civil statutes to be borne by defendants (through judgment or settlement) or, of course, unsuccessful plaintiffs. In either case the financial burden of enforcement is lessened for taxpayers.<sup>175</sup> Conservatives have “championed the role of the private attorney gen-

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<sup>168</sup> Trevor W. Morrison, *Private Attorneys General and The First Amendment*, 103 MICH. L. REV. 589, 599 (2005).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 599–600.

<sup>171</sup> *Id.* In early American colonial history the colonies followed the English tradition of granting private citizens statutory authorization to prosecute crimes and earn, as a reward, any fine a convicted defendant was ordered to pay. *Id.* at 601–02; Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 659–66 (2010). The United States developed the country’s first *qui tam* statute, the False Claims Act (FCA), in 1863, and it remains in use to date. Any private citizen who learns of activity defrauding the federal government can initiate a suit under the FCA and, if successful, be awarded a share of the damages and civil penalties. *Id.*

<sup>172</sup> See, e.g., Morrison, *supra* note 168, at 598, 605 (discussing kinds of civil enforcement actions); Michael Selmi, *Public vs. Private Enforcement Of Civil Rights: The Case Of Housing And Employment*, 45 UCLA L. REV. 1401, 1403 (1998) (discussing private enforcement of civil rights in the housing and employment context).

<sup>173</sup> Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack On Civil Rights: The Empirical Reality Of Buckhannon For The Private Attorney General*, 54 UCLA L. REV. 1087, 1089 (2007).

<sup>174</sup> Morrison, *supra* note 168, at 601.

<sup>175</sup> See Albiston & Nielsen, *supra* note 173, at 1090.



eral because it privatized enforcement” and thus shrunk the role of government.<sup>176</sup> Another advantage of the private attorney general model is protection of marginalized interests.<sup>177</sup> Those without the political capital to ensure proper statutory enforcement of their interests by the government, such as survivors of civil rights violations, are especially likely to benefit.<sup>178</sup> For example, the private attorney general provision in the anti-pornography statute MacKinnon and Dworkin proposed was a response to “the perception that governments tend to under-enforce legal protections for women.”<sup>179</sup> Absent provisions for private attorneys general, enforcement of a civil right may be “wholly dependent on the current attitudes of public enforcers.”<sup>180</sup> Private attorney general provisions thus act as insurance for the legislature to cover the risk the executive branch will value “certain legislative goals less than does the legislature that enacted them.”<sup>181</sup>

## 2. *Buckhannon’s Effect*

In 2001, the Supreme Court in *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Resources* interpreted statutory fee-shifting provisions that granted attorney’s fees to a “prevailing plaintiff” to only allow an award of attorney’s fees where the legal relationship of the parties is materially altered.<sup>182</sup> This interpretation was applied by lower courts to all statutory fee-shifting provisions that granted attorney’s fees to a “prevailing plaintiff.”<sup>183</sup> This decision dealt a strong blow to the efficacy of fee-shifting provisions, “the fuel that drives the private attorney

<sup>176</sup> Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007).

<sup>177</sup> See *id.* (private attorneys general “free[] up civil rights enforcement from any conservative political agenda or administration.”); *Morrison*, *supra* note 168, at 609 (discussing private attorney general protection of interests of the minority political party).

<sup>178</sup> See *Morrison*, *supra* note 168, at 609. Those without political capital are also particularly unlikely to have the financial capital to fund lawsuits, but private attorney general provisions incentivize the plaintiffs’ bar to take cases on a contingency fee basis. See *id.*

<sup>179</sup> *Id.* at 610.

<sup>180</sup> *Id.* at 609 (citing John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983)). A corresponding advantage is the ability of private attorney general provisions to circumvent the negative effects of agency “capture.” *Morrison*, *supra* note 168, at 609. Capture describes undue influence on agencies of the entities they regulate. *Id.* By giving private citizens a right of enforcement, legislatures lessen the under-enforcement effect of capture. *Id.* Agency capture would, of course, be less of a concern where the entities regulated are individual rapists rather than large institutional actors.

<sup>181</sup> *Id.* Liberals have seen private attorney general provisions as a protection for civil rights enforcement against conservative political agendas or administration. See Waterstone, *supra* note 176, at 442.

<sup>182</sup> 532 U.S. 598, 604 (2001). The *Buckhannon* Court interpreted the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA). See *id.* at 598.

<sup>183</sup> Albiston & Nielson, *supra* note 173, at 1104–1116.

general engine.”<sup>184</sup> Prior to *Buckhannon*, nearly all lower and circuit courts accepted the catalyst theory of damages, holding that prevailing plaintiffs could be awarded attorney’s fees even if the case settled, as long as the plaintiff could show that her “lawsuit was a catalyst for voluntary change by the defendant.”<sup>185</sup> The *Buckhannon* Court cited concerns over satellite litigation about fees and the possibility that the catalyst theory deterred defendants from altering their conduct.<sup>186</sup> The dissent’s concerns that making fee recovery less certain would “impede access to court,” and “shrink the incentive Congress created for the enforcement of federal law by private attorneys general” have been confirmed.<sup>187</sup> Empirical research suggests that *Buckhannon* has harmed organizations engaging in private attorney general actions related to impact litigation, civil rights, class actions, and litigation against government actors by discouraging settlement and preventing plaintiffs from obtaining counsel in enforcement actions.<sup>188</sup>

### 3. *Sexual Assault Survivors as Private Attorneys General*

Private civil rights lawsuits have become a quintessential example of private attorney general actions. Civil rights litigation protects against forms of class-based discrimination the legislature has forbidden and is therefore not only in the interest of the plaintiff, but also society at large. The Civil Rights Act of 1964 was one of the first highly effective legislative attempts to combat discrimination against minorities in public and private settings.<sup>189</sup> Congress mandated that government agencies enforce some of the Act’s provisions, but the Act also allowed private plaintiffs to initiate civil rights claims.<sup>190</sup> Courts equitably granted prevailing plaintiffs suing under the Act attorney fees until, in 1975 in *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court held that, while the courts could enforce statutory fee-shifting provisions, they could not create equitable exceptions to the American rule by awarding attorney fees absent specific statutory authorization except in a few well-recognized areas.<sup>191</sup> The sharp drop in civil rights

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<sup>184</sup> Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (2003).

<sup>185</sup> See Waterstone, *supra* note 176, at 444.

<sup>186</sup> Albiston & Nielson, *supra* note 173, at 1091 (citing *Buckhannon*, 532 U.S. at 608–10).

<sup>187</sup> *Id.* at 1101 (citing *Buckhannon*, 532 U.S. at 622–23).

<sup>188</sup> *Id.* at 1130–31; Morrison, *supra* note 168, at 621–22.

<sup>189</sup> See Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005) (“The 1964 Act . . . [is a] landmark legal measure[] outlawing segregation. . . . [It] provides an excellent example of congressional construction of constitutional norms, and it is a landmark statute that effected constitutional change.”).

<sup>190</sup> See 42 U.S.C. § 2000 (1964).

<sup>191</sup> Michael J. McNamara, *Judicial Discretion and The 1976 Civil Rights Attorney’s Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320, 324 (1982) (citing 421 U.S. 240 (1975)).

suits after *Alyeska* motivated Congress to pass the Civil Rights Attorney's Fees Award Act of 1976 to amend the Civil Rights Act of 1964 to include an attorney fee award for prevailing plaintiffs.<sup>192</sup> "Congress saw the need . . . based in part on evidence that the vast majority of civil rights survivors could not afford representation, and that private attorneys were refusing to take civil rights cases because of the limited potential for compensation."<sup>193</sup> Civil rights litigation is "expensive, time consuming, and technical," often requiring plaintiffs and their lawyers to acquire and fund expert testimony.<sup>194</sup> Civil rights claims are less likely than other types of torts to provide plaintiffs' attorneys with an adequate financial incentive absent fee-shifting provisions.<sup>195</sup> Civil rights plaintiffs sometimes seek nonmonetary damages such as injunctive relief, and low or middle-income plaintiffs often seek monetary damages that are significant to them but insufficient to attract an attorney.<sup>196</sup> The fee-shifting provisions enhance private enforcement at little cost to taxpayers because defendants, not the government, pay attorney's fees to prevailing plaintiffs. Private enforcement of civil rights also creates a more robust regulatory regime because the power to police civil rights violations is placed directly in the hands of the survivors.<sup>197</sup> The Reconstruction Acts passed after the Civil War guaranteed blacks the same rights as whites but remained unenforced. The fee-shifting provisions of the Civil Rights Act mitigated against under-enforcement by granting the power and means to enforce the statute to the people with the most to gain from it: those suffering from discrimination.<sup>198</sup> Fee-shifting provisions also insulate civil rights enforcement from shifting political preferences.<sup>199</sup> Without private attorney general provisions, the enforcement of civil rights would largely be left to executive branch agencies. Empirical research has demonstrated that under both Republican and Democratic administrations, private attorneys general are more rigorous than government agencies at enforcing civil rights statutes.<sup>200</sup>

Gender violence was conceptualized as a civil rights violation on the national stage in VAWA.<sup>201</sup> States' reluctance to create civil rights remedies in the wake of *Morrison* may reflect the contested nature of the classification of gender violence as a civil rights violation. Some opponents of VAWA

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<sup>192</sup> *Id.* at 324–25.

<sup>193</sup> Albiston & Nielson, *supra* note 173, at 1088.

<sup>194</sup> Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 Nw. U. L. REV. 1459, 1460 (2007).

<sup>195</sup> See Albiston & Nielson, *supra* note 173, at 1090.

<sup>196</sup> *Id.*

<sup>197</sup> See Selmi, *supra* note 172, at 1403.

<sup>198</sup> McNamara, *supra* note 191, at 323 n.21 (citing 42 U.S.C. §§ 1981–1986 (1976 & Supp. III 1979)).

<sup>199</sup> See Selmi, *supra* note 172, at 1404.

<sup>200</sup> *Id.* at 1403; see also *infra* Part III.

<sup>201</sup> Goldscheid, *supra* note 17, at 733.

preferred to characterize it as a tort law, family law, or criminal regulation.<sup>202</sup> The *Morrison* Court characterized the VAWA civil action as more analogous to a criminal law than to a civil rights remedy.<sup>203</sup> Sexual assault survivors should be conceptualized as potential private attorneys general and financially enabled to file lawsuits because: (1) the lawsuits would be in the public interest, and (2) whether through bias or ineptitude, the government has historically under-enforced the right to be free from sexual assault. Sexual assault is technically a criminal offense in every state, and yet by and large the men who commit rape do so with impunity. Fee-shifting provisions are tools to vindicate public interests in arenas where those interests would otherwise remain under-enforced. Whether the public's interest in deterring sexual assault is characterized as primarily "criminal" or "civil rights" related, survivors should be given a financial incentive to sue because sexual assault deterrence is in the public interest no less than employment discrimination or securities fraud deterrence. Second, in light of persistent discrimination by state governments against sexual violence survivors,<sup>204</sup> it is imperative that survivors be granted the power to enforce their own civil rights. In the face of overwhelming evidence of state government discrimination against gender violence complaints, Congress was persuaded to include fee-shifting provisions for prevailing plaintiffs in the VAWA civil remedy.<sup>205</sup> Catharine MacKinnon described the VAWA remedy as putting "the power to dispute male sovereignty in women's hands."<sup>206</sup> State police and prosecutors are notoriously ineffectual at prosecuting acquaintance rape. If fee-shifting provisions could financially enable sexual assault survivors to sue, state legislatures could give women back the power to protect their own rights that the *Morrison* Court took away from them.

Despite the theoretical importance of conceptualizing plaintiffs in sexual violence suits as private attorneys general, the practical advantages have thus far been negligible. In theory VAWA's civil rights remedy empowers women, but in practice the statute has been used more frequently in law review articles than in court cases.<sup>207</sup> Far from creating a large-scale disruption of male sovereignty, VAWA has been mentioned in fewer than ten reported decisions each year.<sup>208</sup> This phenomenon has repeated itself in the two states and two cities that have enacted statutes modeled after the VAWA civil

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<sup>202</sup> See Goldfarb, *supra* note 111, at 81 ("Contrary to the assertions of some judges, the civil rights remedy did not usurp the role of the states in regulating family law, torts, or criminal law.")

<sup>203</sup> See *United States v. Morrison*, 529 U.S. 598, 617–618 (2000). The Court found that allowing Congress to regulate violence against women "would allow Congress to regulate any crime." *Id.* at 615.

<sup>204</sup> *Id.* at 620.

<sup>205</sup> Renée L. Jarusinsky, *Gender Difference in Perceiving Violence and Its Implication for the VAWA's Civil Rights Remedy*, 27 *FORDHAM URB. L.J.* 965, 966, 972–73 (2000).

<sup>206</sup> MacKinnon, *supra* note 7, at 177.

<sup>207</sup> See Regan, *supra* note 11, at 797.

<sup>208</sup> *Id.* at 799.

rights remedy and in the eleven states that have general civil rights statutes which encompass a right to be free from gender violence. Each of these statutes contains a fee-shifting provision, but by many accounts the statutes are underutilized by survivors of gender violence.<sup>209</sup> The effects of *Buckhannon* aside, fee-shifting provisions have on an annual basis successfully enabled a multitude of traditional civil rights claims,<sup>210</sup> but only a handful of claims from gender violence survivors. Traditionally, civil rights lawsuits are directed at institutional defendants such as companies, schools, or government entities.<sup>211</sup> Like the federal VAWA civil rights remedy, the state gender violence remedies modeled after VAWA are restricted to suits against the perpetrator of the assault. Without providing the hope of monetary damages on the scale an institutional or wealthy defendant can pay, fee-shifting provisions have proven to be an insufficient carrot for the plaintiffs' bar in the new and uncertain territory of gender violence civil rights. Civil claims currently pursued by sexual violence survivors are directed more frequently at institutional defendants that are claimed to be negligently liable for the assault than against individual defendants.<sup>212</sup> While actions against institutions are important, they do not deter or punish individuals for committing sexual assault, nor do they aid survivors who were assaulted by no fault of an institution. Because individual defendants cannot pay damages on the same scale as an institution, a better financial incentive is needed to incentivize the plaintiffs' bar to pursue claims against individuals. In Part III, I propose an enhanced financial incentive for private attorney general sexual assault claims against individual defendants.

### B. *Civil Gideon Provisions*

The goal of the civil Gideon movement is to increase access to legal counsel for indigent persons in civil matters. Just as the Supreme Court recognized a right to criminal counsel for indigent persons in *Gideon v. Wainwright*,<sup>213</sup> some argue the Court should recognize a corresponding right to counsel in civil cases or at least in high stakes civil actions.<sup>214</sup> The movement's achievements have thus far been primarily legislative, as courts have declined to find such a right. In 1981, in *Lassiter v. Department of Social*

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<sup>209</sup> To date, no reported decisions that have adjudicated gender violence claims under these statutes have reached the merits. Anderson, *Women Do Not Report*, *supra* note 51, at 928.

<sup>210</sup> See Selmi, *supra* note 172, at 1418 (demonstrating the large increase in private plaintiffs' federal public accommodations court filings during 1990–1996).

<sup>211</sup> See Albiston & Nielson, *supra* note 173, at 1095 (discussing common school desegregation and environmental enforcement actions and actions against government entities and corporations).

<sup>212</sup> See Bublick, *supra* note 53, at 61.

<sup>213</sup> 372 U.S. 335, 344 (1963).

<sup>214</sup> Mark C. Brown, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 894 (2011).

*Services of Durham County*, the Supreme Court held (5–4) that an indigent parent did not have a per se right to counsel in a parental termination proceeding.<sup>215</sup> The Court further held, “there is a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”<sup>216</sup> The American Bar Association (“ABA”) filed an amicus brief in *Lassiter* imploring the court to recognize a right to counsel.<sup>217</sup> In 2006, the ABA’s house of delegates unanimously approved of a resolution urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in . . . adversarial proceedings where basic human needs are at stake,<sup>218</sup> such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”<sup>219</sup> Hundreds of state laws now guarantee indigent persons a right to counsel in a diversity of contexts, including involuntary civil commitment cases, parental rights termination proceedings, child support proceedings, paternity cases, custody proceedings, and divorces.<sup>220</sup> New York recognizes a right to counsel for both the petitioner and respondent in protective order proceedings,<sup>221</sup> but no state recognizes a right to civil counsel for a person suing for monetary damages as a result of domestic violence or sexual assault.<sup>222</sup>

While the largest obstacle facing legislative efforts to pass civil Gideon provisions may be financial,<sup>223</sup> recent studies have surprisingly shown that civil Gideon provisions actually generate a positive economic impact for state economies far over and above the amount invested in the program. A 2009 Texas study demonstrated that for every direct dollar Texas spends on indigent civil legal services, “the overall annual gains to the economy are

<sup>215</sup> 452 U.S. 18, 18 (1981).

<sup>216</sup> *Id.*

<sup>217</sup> AM. BAR ASS’N ET AL., REPORT NO. 112A, REPORT TO THE HOUSE OF DELEGATES 2 (2006), available at [http://www.legalaidnc.org/public/participate/legal\\_services\\_community/ABA\\_Resolution\\_onehundredtwelvea\[1\].pdf](http://www.legalaidnc.org/public/participate/legal_services_community/ABA_Resolution_onehundredtwelvea[1].pdf).

<sup>218</sup> “[T]he ABA defines ‘basic human needs’ cases as involving either shelter (e.g., eviction proceedings), sustenance (e.g., ‘denials of or termination of government payments or benefits’), safety (e.g., ‘proceedings to obtain or enforce restraining orders’), health (e.g., claims to Medicare, Medicaid, or private insurance for ‘access to appropriate health care for treatment of significant health problems’), or child custody.” Brown, *supra* note 214, at 909.

<sup>219</sup> AM. BAR ASS’N ET AL., *supra* note 217, at 1. The Boston Bar Association Task Force on Expanding the Civil Right to Counsel recommends “the legislature fund pilot programs to establish rights to counsel for civil cases that are quasi-criminal.” Brown, *supra* note 214, at 909–10.

<sup>220</sup> Brown, *supra* note 214, at 908–09.

<sup>221</sup> N.Y. Fam. Ct. Act § 262(a).

<sup>222</sup> See generally Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006).

<sup>223</sup> See Brian Brophy, *A Civil Right to Counsel Through the States Using California’s Efficiency Project as a Model Toward a Civil Gideon*, 8 HASTINGS RACE & POVERTY L. J. 39, 42 (2011) (“There has been little written in opposition to providing access to counsel in civil cases, and what opposition there is tends to focus on the cost to taxpayers of providing such access.”).

estimated at \$7.42 in total spending, \$3.56 in output and \$2.20 in personal income.<sup>224</sup> A 2007 report on the effects of Pennsylvania's Access to Justice Act, which increased surcharges on court filing fees to fund legal aid organizations, found that the Access to Justice funds resulted in a positive economic impact of \$154 million over five years, over four times the amount of funds invested.<sup>225</sup> A Virginia study of the effectiveness of its legal aid programs found "a return of \$2.62 for every dollar of local, state, and federal funds invested."<sup>226</sup>

Provision of legal services to indigent persons has economic benefits for states because such services improve clients' health, bring federal funding into a state, and reduce the need for safety-net programs, the number of re-arrests of juvenile offenders, the time children spend in foster care, and the incidence of domestic violence;<sup>227</sup> such services also prevent homelessness and create efficiency in the court system.<sup>228</sup> The positive economic effect of legal services has had an influence on state legislative debates about the right to counsel.<sup>229</sup> The positive impact of providing indigent survivors of sexual assault with a right to counsel is less certain than the impact of providing traditional legal services because it has not yet been attempted. The provision of counsel to indigent sexual assault survivors would ideally allow indigent survivors to recover monetary damages, thereby reducing survivor reliance on government funding for survivor health services, crime survivor compensation board funds, and social safety net services. Also, if a critical mass of suits by sexual assault survivors culminated in a deterrent effect, the decreased incidence of sexual assault would reduce government expenditures for sexual assault survivors and for sexual assault criminal investigations.<sup>230</sup>

Despite these advantages, two flaws prevent civil Gideon provisions from being an ideal tool to incentivize sexual assault lawsuits. First, civil Gideon provisions provide government appointed attorneys who are often underpaid and overworked, and thus provide low quality representation.<sup>231</sup> Government appointed attorneys, whether for criminal or civil Gideon matters, are paid cut-rate fees and are often of notoriously poor quality,<sup>232</sup> and

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<sup>224</sup> Press Release, Texas Access to Justice Commission, Poor Texans May Lose Legal Aid Services Due to Funding Crisis (Feb. 18, 2009), available at <http://www.texasatj.org/node/293>.

<sup>225</sup> Brophy, *supra* note 223, at 55–56.

<sup>226</sup> *Id.*

<sup>227</sup> Brown, *supra* note 214, at 910 (citing Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139, 155 (2011)).

<sup>228</sup> Brophy, *supra* note 223, at 55.

<sup>229</sup> *See id.* at 55–57 (discussing positive economic impact of state programs providing right to counsel in certain civil cases).

<sup>230</sup> *See United States v. Morrison*, 529 U.S. 598, 628–35 (2000) (Souter, J., dissenting).

<sup>231</sup> *See Abel & Rettig, supra* note 222, at 250.

<sup>232</sup> *See Brown, supra* note 214, at 914–15; *see Abel & Rettig, supra* note 222, at 250.

must maintain very high caseloads in order to make ends meet.<sup>233</sup> Civil Gideon provisions would not allow survivors to shop for quality counsel with whom they could establish a comfortable working relationship based on mutual trust.<sup>234</sup> In *Strickland v. Washington*,<sup>235</sup> the Supreme Court set a low bar for the minimum standard of performance government appointed attorneys in criminal matters must meet.<sup>236</sup> Under the *Strickland* standard, counsel must only offer “reasonably effective assistance.”<sup>237</sup> The Court held the “benchmark for judging any claim of ineffectiveness of counsel must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>238</sup> Thus far, counsel appointed under civil Gideon provisions have been evaluated under essentially the same metric *Strickland* created for government appointed attorneys in criminal matters.<sup>239</sup> The second problem with civil Gideon provisions is that survivors would have to meet a strict standard of indigence to be eligible for counsel.<sup>240</sup> This requirement means that at best, civil Gideon provisions would offer a patchwork solution: middle-income survivors would remain unable or unwilling to bear the heavy financial burden of retaining counsel.

### C. Government Agency Enforcement Actions

Government agency enforcement actions are an undesirable means of subsidizing civil sexual assault claims because these actions are: (1) less effective than private lawsuits, (2) the most expensive form of subsidy, and (3) provide survivors with little autonomy.

Scholars criticize whether allocating resources for the enforcement of civil rights to government agencies is the most efficient means of policing civil rights violations. Despite the substantial amount of resources devoted to government agencies, a review of civil rights case law in the decades following the Civil Rights Act of 1964 demonstrates that private attorneys have been responsible for the “vast majority of important civil rights cases.”<sup>241</sup> Government enforcement agencies are responsible for bringing only a minority of the civil rights suits filed in court.<sup>242</sup> Between 1990 and 1996, the private bar initiated 84.3% of public accommodation discrimination suits.<sup>243</sup>

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<sup>233</sup> Abel & Rettig, *supra* note 222, at 6.

<sup>234</sup> See *supra* Part I.A. (discussing the importance of a survivor’s autonomy over her recovery process).

<sup>235</sup> 466 U.S. 668 (1984).

<sup>236</sup> See *id.*

<sup>237</sup> *Id.* at 687.

<sup>238</sup> *Id.* at 686.

<sup>239</sup> Brown, *supra* note 214, at 911.

<sup>240</sup> Brown, *supra* note 214, at 894–95 (discussing efforts to expand civil Gideon provisions for indigent and low-income parties).

<sup>241</sup> Selmi, *supra* note 172, at 1403.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 1418–19.



The Equal Employment Opportunity Commission (EEOC) finds for defendants in an astonishing 95% of the claims it resolves and obtains only very small awards for plaintiffs when the agency finds in favor of them.<sup>244</sup> Eighty-five percent of complainants are unable to obtain any relief through the EEOC complaint process.<sup>245</sup> The burden of proof is particularly difficult to meet in private employment discrimination cases and plaintiffs are particularly likely to attempt to bring unmeritorious claims. Nonetheless, the private bar not only brings far more civil rights claims (including employment discrimination claims) than the government, but also obtains larger awards for plaintiffs than the government does, with the mean private bar civil rights damages amounting to thirty times the mean government agency damages.<sup>246</sup> Thus, “it appears the government substantiates an extraordinarily low percentage of filed claims, brings very few cases,” “pursues small and easy cases,” and recovers substantially lower awards than the private bar.<sup>247</sup>

The reason for the lack of robust civil rights enforcement by government agencies is uncertain. Scholars historically pointed to the reluctance of Republican administrations to enforce civil rights, but empirical research now shows that the Clinton Administration performed worse than the previous Republican administration.<sup>248</sup> I argue that financial incentives explain the more robust enforcement of civil rights by private attorneys general. Private attorneys general are better incentivized than government attorneys to seek large financial damages because private attorneys usually keep a percentage of those damages. The private bar is also incentivized to take on as many cases as are profitable, but government attorneys have finite enforcement resources and are unlikely to financially gain from maintaining a complex or challenging docket. As such, allocating resources to the private bar is a more promising means of enforcing civil rights than allocating resources to government enforcement agencies.

Government agency enforcement would also be an undesirable mechanism for facilitating gender violence claims because: (1) government agency enforcement is expensive, and (2) agency enforcement would allow for less survivor autonomy than private enforcement. Government agency enforcement requires direct taxpayer funding. In tough economic times, while state legislatures are laying off crucial health, education, and other state employ-

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<sup>244</sup> *Id.* at 1429.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1419–20.

<sup>247</sup> *Id.* at 1438.

<sup>248</sup> *Id.* at 1429–30 (“[T]here was the question of whether the EEOC’s lack of effectiveness might be attributed to the fact that, between 1980–92, the agency was under the control of Republican administrations that were widely perceived as hostile to employment discrimination issues. Perhaps the agency would act differently under a Democratic administration and become a more effective agent for pursuing claims of employment discrimination . . . [T]he recent data indicate that the agency has not changed course; indeed, somewhat ironically, the EEOC has performed worse by most measures under the Clinton Administration than under the Bush Administration, particularly with respect to the level of its litigation activity.”).

ees, the establishment or expansion of a state government agency staffed by lawyers is unlikely to be politically appealing. Even if activists could summon the political will to build the agency, agencies often lack resources and are unable to pursue all the valid claims victims file with the agency.

Government agency enforcement would entail less survivor autonomy than private enforcement. Government agencies represent government interests, and therefore regard victims as witnesses who support their case as opposed to plaintiffs. The government does not directly represent the witness' interests, and instead merely takes their wishes under consideration, thus depriving the witness of empowerment. For example, when the EEOC pursues a discrimination lawsuit, the government, not the survivor, assumes the role of the plaintiff and is empowered to call witnesses and decide when to settle and for how much.<sup>249</sup> Under the Office for Civil Rights ("OCR") complaint process, no one is assigned to represent the will of the complainant<sup>250</sup>—the role of the complainant in the OCR process is more akin to that of a survivor witness than that of a plaintiff. Under the Massachusetts Commission Against Discrimination ("MCAD") complaint procedure, the agency will appoint an agency attorney to prosecute the case "on behalf of *the Commission*" rather than on behalf of the complainant.<sup>251</sup> In a private lawsuit, on the other hand, a plaintiff is empowered to make important decisions about the resolution and strategy of the suit, providing survivors far more autonomy in the litigation process. If the government takes over the role of plaintiff, the survivor is in substantially the same position as a survivor witness in a criminal prosecution: she has no power over the resolution of her complaint.<sup>252</sup> As a plaintiff in a civil action, a survivor at least has the autonomy to bargain with the defense to drop the charges in return for meeting her demands and to adopt the litigation strategy that is best suited to her interests.<sup>253</sup>

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<sup>249</sup> *Id.* at 1428.

<sup>250</sup> *OCR Complaint Processing Procedures*, OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html>.

<sup>251</sup> *A Practical Guide to the Complaint Process at the MCAD*, MASS. COMM'N AGAINST DISCRIMINATION (Jan. 2012), <http://www.mass.gov/mcad> (emphasis added).

<sup>252</sup> When a sexual assault survivor makes a criminal complaint, "well-intentioned people—healthcare professionals, mental health personnel, police, judges, prosecutors, and others—all seek justice for the victim, but inevitably force the victim either to once again feel powerless or to relive the trauma." This has been described as the "second rape." Christopher C. Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 *LAW & PSYCHOL. REV.* 91, 117 (2010).

<sup>253</sup> *Publick*, *supra* note 53, at 73–75.

### III. ENHANCING PRIVATE ATTORNEY GENERAL PROVISIONS FOR SEXUAL ASSAULT CLAIMS

#### A. *A Proposal for States to Create a Survivor Recovery Subsidy Fund for Sexual Assault Plaintiffs*

To financially enable rape survivors to bring civil claims, I propose that state legislatures create a survivor recovery subsidy fund that would pay a survivor's attorney fees for civil suits upfront—whether under a civil rights, traditional tort, or VAWA-style regime—and structure the fund to become partially, if not fully, self-funded. Under the proposed model, upon receipt of a civil complaint for sexual assault that meets the state non-frivolous or retaliatory standard, a judge would be mandated by law to order a reasonable retainer be made available to the plaintiff's attorney from a survivor recovery subsidy fund.<sup>254</sup> Rule 11 of the Federal Rules of Civil Procedure could provide the substance of the non-frivolous standard.<sup>255</sup> If the plaintiff's attorney chose to accept the publicly funded retainer, she would be required by contract to agree to the following provisions: (1) If plaintiff prevails at trial, the complete award of attorney's fees will be paid to the survivor recovery subsidy fund.<sup>256</sup> (2) A reasonable percentage of all monetary damages collected from the defendant, whether through judgment *or through settlement*, must be paid back into the fund. (3) If the attorney spends fewer billable hours on the case than the retainer has allocated funds for, the attorney must pay the complete amount of the excess retainer funds back to the survivor recovery subsidy fund within thirty days of the resolution of the claim, or within two years of filing the claim,<sup>257</sup> whichever is longer. (4) If the attorney requires more billable hours to reasonably effectively represent the plaintiff than the retainer has allocated, the attorney must petition the judge in writing for an

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<sup>254</sup> Guidelines could be provided by the state legislature to judges to explain how to calculate a reasonable retainer. I suggest a forecasted lodestar method would be appropriate. "The Supreme Court has long maintained that in most cases, a 'reasonable' fee is the 'lodestar' fee." *Court Limits Attorney Fees Awarded Under Federal Fee-Shifting Statutes*, WASH. LEGAL FOUND. (Apr. 22, 2010), [www.wlf.org/Upload/litigation/litigationupdate/041010Perdue.pdf](http://www.wlf.org/Upload/litigation/litigationupdate/041010Perdue.pdf).

<sup>255</sup> See Fed. R. Civ. P. 11(b). In brief, the claim cannot be brought for any improper purpose, the claims must be warranted under existing law, and the factual contentions must have evidentiary support or "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.*

<sup>256</sup> Under my proposed model a state statute should define "prevailing plaintiff" to encompass the pre-*Buckhannon* standard of "prevailing." *Buckhannon* only interpreted a statute, and did not hint at any constitutional objection to the catalyst theory. See *infra* Part II.A.2. Thus I propose "prevailing plaintiff" be defined as Congress defined it in the 2007 Open Government Act, obtaining relief through either "(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E) (2007).

<sup>257</sup> The two-year time limit on returning unused portions of the retainer provides an incentive for attorneys to resolve the claim swiftly.

additional disbursement of funds from the survivor recovery subsidy fund. The judge will have discretion to determine whether the additional disbursement of funds is necessary for reasonably effective representation.

Crucially, the survivor recovery subsidy fund would be made available to plaintiffs regardless of their income or assets. Damages from successful settlements or judgments would subsidize the cost of unsuccessful lawsuits, defined as lawsuits where the cost of litigation outweighed the amount of damages collected. Of course, at the stage of the initial filing of the complaint, a plaintiff's attorney can rarely be certain whether the amount of damages she will collect will outweigh her cost of litigation. The offer of a retainer from the survivor recovery subsidy fund will be attractive even for attorneys with claims against wealthy defendants because the fund reduces the attorney's risk of downside to zero, while only nominally reducing the client's potential upside. The plaintiff's attorney would remain free to bargain with the plaintiff regarding the percentage of damages the attorney will retain. This flexibility allows plaintiffs with very strong cases to bargain with their attorneys to retain a higher percentage of the damages, but also allows plaintiffs with weak cases to bargain away a greater percentage of their potential upside in order to entice an attorney to take the case.

Under the proposed model, survivors would also be empowered to file suits against low-income defendants because attorneys would be guaranteed payment regardless of defendant insolvency. For sexual assault survivors, wealthy or indigent, a civil suit against a low-income defendant may still be worthwhile for the purpose of obtaining an apology, a declaratory judgment of a perpetrator's guilt, or the perpetrator's transfer to a different school, apartment, or job.<sup>258</sup> Furthermore, because defendants' future wages can be garnished to satisfy a judgment,<sup>259</sup> even low-income defendants without money in savings to satisfy a judgment can be effectively punished by a judgment or settlement for modest damages.

My proposed model provides a solution to the shortcomings that I identified in the existing models of government subsidies. First, this proposal is an improvement on the existing private attorney general model because it will provide a more effective financial incentive for attorneys to represent sexual assault plaintiffs. My proposed solution should not only eviscerate the negative effect of *Buckhannon*, but also create a better incentive than what was available for private attorneys general pre-*Buckhannon*: a guaranteed payment of reasonable attorney fees at the time the lawsuit is filed. When an attorney considers the possible financial benefits of accepting a civil rights plaintiff on a contingency fee basis, she weighs the probability of recovering attorney's fees, the probability of collecting damages, and the probable amount of damages she would retain. It would be easiest for the legislature to alter the probability of recovering attorney's fees. Upfront payment of

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<sup>258</sup> See Bublick, *supra* note 53, at 74–75.

<sup>259</sup> See *id.*

attorney's fees would greatly enhance the perceived profitability of sexual assault claims against individual defendants.

Second, my proposal allows survivors the autonomy to shop for and personally select an attorney of their choice. This autonomy, as well as the latitude for the fund to pay reasonable, rather than cut-rate fees, will help ensure survivors have access to quality counsel.

Third, my proposal allows survivors to retain utmost strategic control of the litigation. A survivor would be allowed to settle at any point during the course of the litigation for whichever terms she found agreeable. Because a survivor is empowered to settle or drop her claim at any point in the litigation, she is not locked into a course of action like she would be if she made a criminal complaint. Once a survivor makes a criminal complaint, even if she changes her mind, the government may elect to proceed without her cooperation and subpoena her to testify at trial. In civil litigation, conversely, a survivor may elect to drop her claim at any point, and will not be compelled to testify at trial against her will. While civil litigation may invade the privacy of a survivor, she is at least empowered to drop the claim at any point she chooses.

Fourth, my proposal would help underscore the value of sexual assault claims to the general public, making sexual assault survivors more willing to bring claims. Sexual assault survivors suing for monetary damages are often depicted in the media as greedy and willing to lie to make money.<sup>260</sup> By placing government funding, and thus the government's imprimatur, behind the claims of sexual assault survivors, the public interest behind these claims may become more salient in popular culture. Fifth, my proposal involves low administrative costs. Rather than requiring the establishment of an entire government agency to enforce civil suits, the only administrative requirements are that (1) judges must issue orders for disbursement of funds upon receipt of a non-frivolous complaint for sexual assault, and (2) a state government employee must disburse the funds to the plaintiffs' attorneys. To decrease the judge's discretion, and even further save administrative costs, the statute could dictate the amount of a reasonable attorney retainer for a sexual assault civil claim. Alternatively, the judge could be required to make a finding as to a reasonable retainer in her order. In either case, the adminis-

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<sup>260</sup> See, e.g., Steve Lipsher & Howard Pankratz, *Bryant Team Assails Payments to Accuser*, CHIC. TRIB., [http://articles.chicagotribune.com/2004-07-30/sports/0407300318\\_1\\_accuser-defense-attorney-pamela-mackey-pretrial-hearing](http://articles.chicagotribune.com/2004-07-30/sports/0407300318_1_accuser-defense-attorney-pamela-mackey-pretrial-hearing) ("Defense attorneys claim that the woman who accused Kobe Bryant of sexual assault has received nearly \$20,000 in victim's compensation, calling it an unusually high amount that casts doubt on her reasons for pursuing the case."); Eloise Lee, *Marines Offer Brutally Honest Insight on Military Rape Culture*, BUS. INSIDER, [http://articles.businessinsider.com/2012-03-12/news/31146664\\_1\\_military-cases-sexual-assault-military-justice-system#ixzz2BhDyvtlw](http://articles.businessinsider.com/2012-03-12/news/31146664_1_military-cases-sexual-assault-military-justice-system#ixzz2BhDyvtlw) A Marine commenting on a recent lawsuit by eight former members of the U.S. military who alleged they were raped during their service and faced retaliation when they reported it stated, "I wish they would keep rape in a criminal court and not civil. I don't believe people's initial motives if there is money involved." *Id.*

trative costs would be much more affordable than government agency enforcement. Furthermore, a state legislature could easily adopt my proposed model on an experimental basis, because my proposed program has minimal start-up costs and, in the event it failed to incentivize claims, little money would be lost. If the program is successful at incentivizing claims, but a state legislature finds the fund is becoming insolvent, the legislature could tweak the terms of the retainer agreement to increase the percentage of damages that must be contributed to the fund.

Even if the survivor recovery subsidy never becomes fully self-funding, both equality activists and fiscal conservatives have a strong argument for mandating government subsidization of the fund. Rape is occurring on an epidemic level at real costs to state governments.<sup>261</sup> Because so few rapes result in prosecution, the government currently spends disproportionately little money on punishing and deterring crimes against women vis-à-vis other violent crimes. Not only is this inequitable funding allocation discriminating against women, but the resultant pervasiveness of sexual assault is expensive for state governments. The Congressional factual findings at the VAWA hearings clearly demonstrated the exorbitant expense of gender violence, including sexual assault, for state governments.<sup>262</sup> Many survivors of sexual violence have difficulty maintaining employment, finishing their education, and using public transportation.<sup>263</sup> The survivors who are able to keep their jobs frequently suffer lost productivity and increased absenteeism.<sup>264</sup> State governments often foot the bill for safety net programs such as public housing, unemployment benefits, and medical expenses for survivors.<sup>265</sup> As such, the cost of my proposed subsidy might be outweighed by its deterrent effect on sexual assault, a crime that taxes state government resources.

Additionally, Congress should make VAWA funding eligible to fund tort claims by rape survivors. The VAWA statute provides that while VAWA grants may be used to provide some legal services to survivors of gender violence, the grants may not be used to finance tort litigation.<sup>266</sup> It is ironic that when Congress passed the first federal civil rights remedy for gender violence it simultaneously mandated that none of the statute's annual \$1.6 billion in grants may be allocated for civil rights remedies. If Congress made

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<sup>261</sup> See *supra* Introduction.

<sup>262</sup> Brief of Law Professors as Amici Curiae in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) available at <http://womhist.alexanderstreet.com/vawa/doc18.htm>. (“Witnesses estimated that businesses lost \$3-5 billions [sic] annually ‘due to absenteeism’ and loss of productivity related to violence against women. Physicians testified, for example, that at least 37% of female hospital emergency room cases are due to abuse, and Representatives learned of the Surgeon General’s conclusion that ‘battery is the single largest cause of injury among women.’ Health care costs, by some estimates, were \$5-10 billion per year.”).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> 42 U.S.C. § 13925(b)(9).

VAWA funding eligible for tort: (1) federal VAWA funds could help fund states' survivor recovery subsidy funds, or (2) at the very least, in states that do not adopt a survivor recovery subsidy fund, individual legal services organizations could use VAWA funds to hire attorneys to take survivors' claims for free. Given the importance of civil remedies for survivors, the prohibition on the use of VAWA funds for tort is inexcusable.

## *B. Addressing Potential Objections to the Proposal*

### *1. Constitutional Objections*

My proposal is arguably vulnerable to a claim that a state government that adopted my proposed model would be unconstitutionally denying civil rape defendants due process rights by privileging plaintiffs' claims prior to adjudication on the merits. However, while no court has adjudicated the constitutionality of a government subsidy offering plaintiffs the same benefits as my proposed model, analogous forms of government subsidies have not been held unconstitutional. Varying degrees of government subsidization of civil suits by private plaintiffs against individual defendants already occur without constitutional objection through the allocation of both federal and state government funds to legal services organizations. Legal services organizations often receive government funding to pursue civil claims directly against individual defendants (many of whom are indigent or elect to proceed pro se) such as divorces, custody and child support actions, and restraining orders.<sup>267</sup>

My proposal is not likely to be vulnerable to a claim that the government is creating an unconstitutional power imbalance between two private parties. Fee-shifting provisions empower plaintiffs at the expense of defendants, but the constitutionality of fee-shifting provisions has not faced a serious challenge. *Buckhannon* did not question the constitutionality of the catalyst method of fee-shifting, but merely interpreted the phrase "prevailing plaintiff" in statutes to mean a plaintiff who had received a judgment in her favor or a court-ordered consent decree.<sup>268</sup> In response to *Buckhannon*, Congress provided a more specific definition of a "prevailing plaintiff" in a 2007 amendment to the Freedom of Information Act (FOIA): the OPEN Government Act.<sup>269</sup> The Act stated a plaintiff "has substantially prevailed if the complainant has obtained relief through either (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not

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<sup>267</sup> See, e.g., *Fact Sheet on the Legal Services Corporation: What is the Legal Services Corporation?*, THE LEGAL SERVICES CORP. (Jan. 8, 2012), <http://www.lsc.gov/about/what-is-lsc>.

<sup>268</sup> 532 U.S. at 598–99.

<sup>269</sup> See 5 U.S.C. § 552(a)(4)(E) (2007).

*insubstantial.*<sup>270</sup> Courts have interpreted the OPEN Government Act as statutorily reinstating the catalyst theory of fee-shifting provisions under FOIA without any constitutional objection.<sup>271</sup>

Fee-shifting provisions shift the power balance towards the plaintiff at the expense of the defendant prior to a court's adjudication of the merits of a plaintiff's claim. Before even filing her complaint, a potential plaintiff may leverage the possibility of attorney fee awards to negotiate a better settlement from a defendant. Admittedly, my proposed model differs from established methods of fee-shifting in that plaintiffs are awarded attorney's fees prior to and regardless of the defendant's response to the litigation. However, because under my proposal the government rather than the defendant is initially providing the attorney's fees, adopting my model would not alter the defendant's financial burden.

The constitutionality of the government's right to fully fund the enforcement of civil statutes, even against individual defendants, has already been established. Power imbalances are salient in the context of government agency enforcement, and government agency enforcement of civil statutes at times entails government prosecution of civil claims against individual defendants. For example, Immigration and Customs Enforcement ("ICE"), the second largest investigative agency of the federal government, initiates civil deportation proceedings against individual defendants on a daily basis.<sup>272</sup> The government does not provide counsel for indigent defendants in ICE actions because, in the civil context, this power imbalance is not unconstitutional.<sup>273</sup> The U.S. Securities and Exchange Commission ("SEC") and the Environmental Protection Agency ("EPA") also initiate civil agency enforcement actions against individual defendants.<sup>274</sup> While my proposal offers a novel model of government subsidization of civil suits, it will not privilege plaintiffs or burden defendants in an unconstitutional manner.

<sup>270</sup> *Id.* (emphasis added).

<sup>271</sup> See *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 370 (D.C. Cir. 2008); *Sally Hart and Ctr. for Medicare Advocacy, Inc. v. United States Dep't Of Health And Human Services*, 676 F. Supp. 2d 846, 849–51 (D. Ariz. 2009).

<sup>272</sup> *Enforcement and Removal Operations*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited May 7, 2011).

<sup>273</sup> A right to counsel has only been held to exist in criminal actions because of the Sixth Amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963).

<sup>274</sup> In 2004, the SEC sought civil monetary penalties from the infamous Jeffrey Skilling of Enron for "violating, and aiding and abetting violations of, the antifraud, lying to auditors, periodic reporting, books and records, and internal controls provisions of the federal securities laws." Press Release, U.S. Securities and Exchange Commission, SEC Charges Jeffrey K. Skilling, Enron's Former President, Chief Executive Officer and Chief Operating Officer, With Fraud (Feb. 19, 2004), available at <http://www.sec.gov/news/press/2004-18.htm>. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes the EPA to enforce the statute's civil environmental regulations against individual citizens in violation of the Act. See 42 U.S.C. § 9613 (2006).



## 2. *Survivors' Unwillingness to Sue Their Rapists*

The proportion of rape survivors who initiate civil suits against their assailants remains low even in jurisdictions that have adopted VAWA model statutes or civil rights statutes for gender violence.<sup>275</sup> The underuse of the civil remedies is likely reflective of: (1) a lack of access to legal counsel, (2) a lack of public awareness about the civil remedies, and (3) a societal bias against lawsuits by rape survivors. My proposal would eradicate the first impediment, but the other two problems should be addressed.

The lack of public awareness of the cause of action may be addressed through an education campaign to inform the plaintiffs' bar, legal services organizations, and the general public about the survivor recovery subsidy fund.<sup>276</sup> State governments could also require police departments to apprise rape survivors of their right to seek civil redress against both the perpetrator and any third party who bears some responsibility for the assault.<sup>277</sup> Law Professor Tom Lininger suggests that just as police officers are required to memorize Miranda warnings, they could be required to provide rape survivors with a brief description of civil remedies and a comparison of possible civil and criminal recourses.<sup>278</sup> Lininger hopes that just as police departments were instrumental in expanding the use of rape crisis centers by informing survivors of their services, they can also be instrumental in increasing survivor use of civil remedies.<sup>279</sup>

As for societal bias against rape survivors' lawsuits, by creating a survivor recovery subsidy fund the government would place its imprimatur behind the plaintiffs' claims. The government's explicit endorsement of rape survivors' claims would likely decrease societal bias against the claims.<sup>280</sup> Likewise, if police departments encourage survivors to use civil suits, perhaps societal prejudice against civil suits by survivors would also decrease, just as Miranda warnings decreased societal bias against post-arrest silence.<sup>281</sup>

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<sup>275</sup> See *supra* Introduction.

<sup>276</sup> See Goldscheid, *supra* note 17, at 755 (suggesting that the lack of knowledge about state and local civil rights laws authorizing a cause of action for gender-based violence lead to their under-utilization, and that education campaigns may help raise public awareness).

<sup>277</sup> Lininger, *supra* note 18, at 1636–37 (suggesting protocols for police agencies).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> For example, Plaintiff Jamie Leigh Jones, who sued defense contractor KBR alleging gang rape on the job, “was [portrayed as] a relentless self-promoter who has sensationalized her allegations against the KBR Defendants in the media, before the courts, and before Congress.” Stephanie Mencimer, *Why Jamie Leigh Jones Lost Her KBR Rape Case*, MOTHER JONES (Jul. 7, 2012), <http://motherjones.com/politics/2011/07/kbr-could-win-jamie-leigh-jones-rape-trial?page=1>. If the government encouraged survivors to bring lawsuits through the creation of a survivor recovery subsidy fund, it is less likely that the initiation of a lawsuit would be viewed by the public as inappropriate self-promotion.

<sup>281</sup> Lininger, *supra* note 18, at 1637.

Because each survivor is an individual with different needs, it is not possible for one legal remedy to be perfectly crafted to the needs of every survivor. Even if societal bias and legal remedies improved immeasurably, some survivors might still not wish to pursue any legal remedy. The purpose of the survivor recovery subsidy fund is to ensure that a lack of financial resources does not prevent any survivor from seeking civil justice.

### 3. *Other Objections*

#### a. *Insolvency of defendants*

Some academics have argued that lawsuits against individual rape defendants are largely a waste of time because of defendants' inability to satisfy judgments.<sup>282</sup> If the government funds the litigation, whether through a survivor recovery subsidy fund or VAWA funds, this objection becomes less important. If survivors are receiving free legal representation they do not need a large financial reward in order to recoup their litigation costs. While a small proportion of rapists are insolvent, rapists belong to a broad range of socioeconomic groups.<sup>283</sup> The idea that "rapists rarely have any money"<sup>284</sup> is a myth that fails to account for the frequency with which middle- and upper-class men commit acquaintance rape. Even where defendants do not have assets that may be liquidated to satisfy a judgment, the court may order wage assignment to ensure future earnings are diverted to paying the judgment.<sup>285</sup> Furthermore, some survivors may wish to sue even an insolvent rapist in order to obtain an injunction requiring the rapist to move schools or jobs or to obtain a guilty verdict.<sup>286</sup>

#### b. *Settlements often do not admit wrongdoing*

Critics may argue that, while my plan would encourage survivors to pursue litigation against their rapists, the financial expense of litigation

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<sup>282</sup> Easton, *supra* note 30, at 33–34 (“Crime victims theoretically can sue perpetrators for damages, but perpetrators rarely have the assets to pay a significant judgment.”); *see also id.* at 34–35 (“Insurance is unavailable for satisfaction of judgments against criminals because insurance for criminal acts is generally considered contrary to public policy. Given the significant costs of litigation, securing an uncollectible civil judgment against a criminal defendant would be a rather Pyrrhic victory. Therefore, very few crime victims file civil suits. The contrast between crime victims and tort plaintiffs in terms of achieving meaningful recoveries is stunning—and difficult to defend. An individual who is paralyzed by a defective product or by medical malpractice may recover millions in damages. In contrast, an individual who is paralyzed by the stray bullet of a drive-by shooter or the well-directed bullet of a known gunman will usually recover nothing.”).

<sup>283</sup> *Myths and Facts*, RAPE CRISIS CENTER OF THE COASTAL EMPIRE (Mar. 18, 2012), <http://www.rccsav.org/infomythsfacts.html> (“Most rapist [sic] appear normal and are young and married. They can be of any race, color, or socio-economic class.”).

<sup>284</sup> Francis X. Shen, *How We Still Fail Rape Victims: Reflecting On Responsibility And Legal Reform*, 22 COLUM. J. GENDER & L. 1, 32 (2011).

<sup>285</sup> *See* Bublick, *supra* note 53, at 73–74.

<sup>286</sup> *See supra* Part I.A.

might pressure defendants to settle, and those settlements would arguably be inadequate for some survivors, as most settlement agreements do not require civil defendants to admit wrongdoing. This objection fails to recognize that a case does not settle unless the plaintiff agrees to the settlement offer. If a plaintiff values monetary damages more than an admission of guilt, she may agree to settle without the admission of guilt. Defendants should not be hampered by fear of criminal liability if they make an admission in their settlement agreement. Federal Rule of Evidence 408 bars the admission of civil settlements or negotiations to prove liability or the amount of the settlement.<sup>287</sup> Alternatively, if a survivor prefers a guilty verdict or admission more than monetary damages, she may decline settlement offers that do not include an admission.

#### 4. *Feminist Objections*

Some feminists have explicitly argued that championing the use of civil law suits by rape survivors is socially undesirable.<sup>288</sup> They argue that making civil remedies available to rape survivors trivializes rape.<sup>289</sup> Commentators are particularly worried that if acquaintance rape survivors are successful in civil court but not in criminal court, acquaintance rape will be increasingly labeled by society as insufficiently serious to merit criminal prosecution.<sup>290</sup>

A two-tier system where violent stranger rapes are criminally prosecuted but acquaintance rapes are only tort matters is unsatisfactory,<sup>291</sup> but legal reform is not a zero sum game in which any gains made in the civil arena will equate to losses in the criminal justice arena. Reform efforts can be made in concert rather than in competition. The criminal justice system should be made more hospitable to all forms of rape claims even as civil remedies are made increasingly accessible to rape survivors. Civil claims are not inharmonious with criminal prosecutions. Civil claims commonly arise as a result of other felonious crimes. The family members of murder victims and assault and battery victims regularly file civil claims against the perpe-

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<sup>287</sup> FED. R. EVID. 408.

<sup>288</sup> See, e.g., Casarino, *supra* note 122, at 200.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* (“Widespread use of civil lawsuits against rapists, however, runs the risk of creating a two-tier system presenting stranger-perpetrated, ‘violent’ rapes as true crimes, and ‘non-violent’ acquaintance rapes as mere torts. This classification reflects the lingering misunderstanding that acquaintance rapes are less serious than stranger rapes, and that somehow less guilt attaches to men who rape their friends and girlfriends than those who choose their victims off the street. Sidelining acquaintance rapes to the arena of tort law perpetuates this distinction, trivializes the attacks and utterly fails to discourage potential rapists.”).

<sup>291</sup> It is precisely this objection that makes it crucial that funding for tort actions be made equally available to both stranger rape victims and acquaintance rape victims.

trators.<sup>292</sup> For a victim with a meritorious claim for medical bills and lost wages, monetary damages probably do not feel *trivial*. Where the criminal justice system has failed to properly convict a guilty party but the civil justice system has found him guilty, society does not trivialize the seriousness of the crime.<sup>293</sup>

Recalling that salient goals of many survivors are privacy, autonomy, and monetary damages,<sup>294</sup> some survivors will prefer civil claims to criminal complaints, and vice versa, while others will prefer not to pursue legal remedies at all. Advocacy and reform should strive to make the full array of legal options available to survivors so that they may choose for themselves the path that is most desirable.

#### CONCLUSION

Despite extensive reform efforts to the criminal justice system, rapists continue to rape with impunity. Improvements to evidentiary rules, law enforcement practices, and judicial procedure have not created an effective punishment or deterrent for acquaintance rape. Because of the difficulty of establishing proof beyond a reasonable doubt, acquaintance rape survivors are particularly unlikely to benefit from criminal justice reform. While criminal reform efforts must continue, the civil justice system offers distinctive advantages for rape survivors: a lower burden of proof, a more even distribution of rights and procedural benefits, increased control over the course of the litigation, monetary damages, and injunctive remedies. As such, the civil justice system offers an alternative avenue for justice.

Civil remedies for rape survivors remain nonexistent at the federal level and extremely underutilized at the state level. Academics are fond of blaming the lack of lawsuits by rape survivors on survivors' unwillingness to testify or persevere through the lengthy and arduous civil litigation process. While this explanation is undoubtedly true for some portion of rape survivors, it obscures the importance of financial incentives. At present, gender violence victims primarily use civil remedies to sue large institutional third party defendants rather than individual perpetrators. While suits against third party defendants are instrumental to incentivizing structural change in schools and workplaces, the solution is only partial. Lawsuits against institutions do not hold individual perpetrators accountable or deter rapes outside the institutional setting. The desperate need for rape deterrence remains un-

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<sup>292</sup> See, e.g., Erin Meyer, *Victim's Kin Awarded \$40M*, CHIC. TRIB., July 28, 2011, at C11, available at [http://articles.chicagotribune.com/2011-07-28/news/ct-met-yang-civil-verdict-20110728\\_1\\_civil-case-marni-yang-rhoni-reuter](http://articles.chicagotribune.com/2011-07-28/news/ct-met-yang-civil-verdict-20110728_1_civil-case-marni-yang-rhoni-reuter).

<sup>293</sup> For example, after O.J. Simpson was acquitted in his criminal trial, many Americans cheered when he was convicted in his civil trial. Steve Friess, *O.J. Simpson Convicted of Robbery and Kidnapping*, N.Y. TIMES, Oct. 4, 2008, available at <http://www.nytimes.com/2008/10/04/world/americas/04iht-simpson.1.16687098.html>.

<sup>294</sup> See *supra* Part II.A.

met through the criminal justice system, and increasing the number of civil claims by sexual assault survivors is especially vital to the public interest. We must financially enable survivors' need to pursue claims against individual defendants, but at present, the plaintiffs' bar is incentivized to take survivors' claims on a contingency fee basis only where the potential payout is large enough to merit the risk.

Lawsuits in the public interest can be incentivized through a government subsidy, but the existing forms of government subsidy for lawsuits are not ideally crafted for sexual assault survivors. Civil Gideon provisions would ensure that indigent women had access to counsel, but this would be a partial, clumsy solution. Government agency enforcement actions would provide a more effective solution, but survivors would have little control over the course of the litigation and the financial cost and political will required to create and fund the agency would be exorbitant. Established private attorney general remedies have proven insufficient to incentivize suits against individual defendants. Because lawsuits against individual defendants are much less likely than suits against third parties to result in multi-million dollar judgments and attorney fee awards, private attorney general provisions have failed to incentivize substantial numbers of sexual assault claims against individuals.

I propose state governments create an enhanced private attorney general provision for rape survivors. State governments could create a survivor recovery subsidy fund that pays private attorneys a retainer to represent sexual assault survivors in claims against individual defendants. A portion of each settlement or monetary damages award would be paid back into the fund. Through the survivor recovery subsidy fund, the government could reduce the risk of nonpayment of attorney fees to zero. Guaranteed upfront payment of attorney's fees would change the plaintiffs' bar's risk-reward calculation so that lawsuits against individual defendants would be attractive even if the probability of a large settlement or damages award was low. To encourage quality representation, attorneys could also be allowed to take a percentage of any settlement or damages awarded to the plaintiff. A survivor recovery subsidy fund would thus guarantee rape survivors access to counsel and guarantee counsel access to attorney's fees, and because of the influx of revenue from settlements and monetary damages, the fund would be less expensive than government agency enforcement actions or civil Gideon provisions.

The government's imprimatur and its money should be placed behind the claims of sexual assault survivors. Neither the brief existence of a federal civil rights remedy nor the creation of state level civil rights remedies raised the total proportion of sexual assault survivors who bring civil claims much higher than one percent.<sup>295</sup> Congress should end its restriction on using

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<sup>295</sup> While one million women are raped each year in the United States, it is unlikely more than 10,000 lawsuits are filed by rape victims each year. *See supra* note 15 and

VAWA funds for tort actions, and advocates and the academy must admit that civil remedies, both traditional and progressive, are rarely used by rape victims. Innovations such as the proposed survivor recovery subsidy fund are needed to financially enable survivors to bring their claims and financially incentivize the plaintiffs' bar to champion their cases. As Catharine MacKinnon lamented after the Supreme Court struck down the federal civil right to be free from gender violence in *Morrison*, the nation is presently organized to "preclude relief for the violation of one half of its people by the other,"<sup>296</sup> but we need not remain so organized.

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accompanying text; see also Lininger, *supra* note 18, at 1570 ("Since the 1970s, 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.").

<sup>296</sup> MacKinnon, *supra* note 10, at 177.