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USING MEDIATION IN CASES OF SIMPLE RAPE

A woman in the United States today faces a one in three chance of being raped at some time during her life.[1] Women in the United States endure even greater risk of becoming rape victims if the number of women who suffer attempted rape is considered in the statistic as well.[2] This staggering number of rapes falls into two classifications: aggravated or simple.[3] An aggravated rape involves violence, several assailants, or a victim and defendant who were complete strangers at the time of the offense.[4] A simple rape involves none of these three aggravating circumstances.[5] Rather, a simple rape may be what is called an "acquaintance rape" if it involves parties who knew each other prior to the assault, or a "date rape" if the intercourse occurs without the consent of the woman in a relationship that appears socially appropriate for sexual intimacy.[6] In both kinds of simple rape, the victim may behave prior to the rape in a way that the rapist misinterprets or chooses to ignore.[7] This failed communication between the victim and the offender precipitates the rape in at least some cases.[8]

The categorization of rape as aggravated or simple is important because the incidence of completed rape depends on whether statistics include both aggravated and simple rape.[9] If only aggravated rape is considered, rape appears relatively rare.[10] However, rape becomes much more common if

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1. *See* M. KOSS & M. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY APPROACHES TO TREATMENT 10 (1987) (citing D. RUSSELL, SEXUAL EXPLOITATION (1984)) (discussing frequency of rape in United States). Up to 44% of adult women in the United States have experienced a sexual assault. *Id.*; Hughes & Sandler, *"Friends" Raping Friends*, Project on the Status and Education of Women, Association of American Colleges 1 (1987) (discussing frequency of date and acquaintance rape in United States). Men commit the overwhelming majority of rapes. *Id.*

2. *See* Johnson, *On the Prevalence of Rape in the United States*, 6 SIGNS 136, 145 (1980) (discussing risk of women becoming victims of sexual attack). Nationally, a conservative estimate is that 20% to 30% of girls twelve years old in 1980 will be victims of sexual violence during the remainder of their lives. *Id.* This estimate excludes girls under 12 years old and sexual assault within marriage. *Id.* The average American woman is as likely to be the victim of a sexual attack as she is to be divorced or diagnosed with cancer. *Id.* at 146.

3. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 252 (1966) (explaining classification of rapes as aggravated or simple).

4. *See id.* (defining "aggravated rape").

5. *See id.* (defining "simple rape"); *see also*, Hughes & Sandler, *supra* note 1, at 1 (defining date and acquaintance rape).

6. *See* M. KOSS & M. HARVEY, *supra* note 1, at 11 (defining date and acquaintance rape). Relationships in which acquaintance rape may occur include friends, neighbors and relatives. *Id.* Most of these relationships are ones in which the expression of sexual behavior is not appropriate. *Id.*

7. *See* H. KALVEN & H. ZEISEL, *supra* note 3, at 252 n.14 (defining "simple rape").

8. *See id.* (discussing factors leading to occurrence of simple rape).

9. *See* S. ESTRICH, REAL RAPE 10 (1987) (discussing frequency of occurrence of rape).

10. *See id.* (discussing apparent incidence of rape when considering only aggravated rape).

simple rape is included in the count.[11] The assailant in the majority of attempted and completed rapes is someone the victim previously knew.[12] Thus, because most rapes occur without physical violence or multiple assailants, most rapes are simple rapes.[13]

Victims of aggravated rape report the rape more frequently than victims report other crimes and the state prosecutes aggravated rape aggressively.[14] In contrast, although simple rapes occur far more frequently than aggravated rapes, the criminal justice system generally deals with simple rapes ineffectively.[15] Victims fail to report a large number of rapes to the police, and accordingly, many rape cases never enter the criminal justice system.[16] Reasons for the large number of unreported rapes are many.[17] First, a victim may have personal reasons for not reporting including, among other reasons, privacy concerns and fear of retaliation from the offender.[18] Second, a victim may have to endure skeptical questioning by the police and prosecutor.[19] Finally, the rape proceedings exact a heavy emotional toll on the victim because she frequently must defend her credibility on the issue of consent.[20] As a result of these systemic problems, many women decide not to report their rapes at all, and those women who report rape often see the rape case end without ever being resolved.[21]

In addition, victims endure great stress during the prosecution process, often worse than the rape experience itself.[22] Although the criminal justice

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11. *See id.* (discussing increased incidence of rape when considering both aggravated and simple rape).

12. *See id.* at 12 (discussing frequency of sexual attacks by men previously known to victim).

13. *See supra* notes 8-12 and accompanying text (discussing incidence of simple rape); Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 104 (1984) (discussing common occurrence of date rape). In a study of seventy-one self-disclosed date rapists, Kanin found date rape to be common in the college setting. *Id.* The date rapists that Kanin studied disclosed in interviews and questionnaires three times more rape episodes at the large university they attended than victims reported in the surrounding community of about 100,000 population during the same time period. *Id.*

14. *See* S. ESTRICH, *supra* note 9, at 10 (discussing reporting rates and prosecution of aggravated rape).

15. *See id.* at 56 (discussing failure of criminal justice system to prosecute simple rape).

16. *See* Johnson, *supra* note 2, at 138 (discussing low reporting rates for rape).

17. *See* Fattah, *Becoming a Victim: The Victimization Experience and Its Aftermath*, 6 VICTIMOLOGY 29, 32 (1981) (discussing reasons for victims' failure to report many crimes).

18. *See id.* (discussing reasons for victims' failure to report many crimes).

19. *See* Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 428 (1985) (discussing difficulties rape victims have in pressing criminal charges against rapists).

20. *See id.* (discussing emotionally stressful nature of rape proceedings for rape victim).

21. *See infra* notes 60-91 and accompanying text (discussing unacceptable results of adversary process in criminal justice system).

22. *See* Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 303 (1974) (explaining that many rape victims report that prosecution experience was worse than rape itself); *infra* notes 46-59 and 76-79 and accompanying text (discussing stress rape victim endures during prosecution of assailant).

system no longer routinely ignores or maltreats victims of crime, problems still exist.[23] Especially in rape cases, the court often in effect puts the victim on trial instead of the alleged rapist.[24] However, simple rape cases frequently are not prosecuted, and even if they are prosecuted, the cases rarely end in a conviction.[25] As a result, another form of conflict resolution, mediation, is frequently more appropriate in simple rape cases.[26] In contrast to the criminal justice system's current procedures for handling simple rape cases, mediation can provide a quick, responsive, and humanistic solution for many simple rape cases.[27] In addition, mediation between a victim and her assailant may result in greater healing and more effective resolution of the event for those involved.[28] Accordingly, those involved in dealing with simple rape cases should consider mediation as an alternative, and potentially more effective, means for resolving reported simple rape cases.[29]

Rape is a unique type of trauma for several reasons.[30] Most obviously, rape consists of the violation of the most private parts of a woman's body and self.[31] Because the idea that a friend or acquaintance could commit this ultimate violation so disturbs society, members of society often see a victim of a simple rape as partially responsible.[32] Consequently, society often stigmatizes rape victims, especially victims of simple rape.[33] Rape also is a unique type of trauma because rape is done to a woman by another person, frequently someone she knew and trusted.[34] Additionally, rape is an act of

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23. *See* Wright, *The Impact of Victim/Offender Mediation on the Victim*, 10 VICTIMOLOGY 631, 631 (1985) (discussing criminal justice system's maltreatment of victims).

24. *See id.* (discussing courts' tendency to put rape victims on trial).

25. *See* S. ESTRICH, *supra* note 9, at 4 (discussing infrequency of prosecution and conviction in acquaintance rape cases).

26. *See infra* notes 169-306 and accompanying text (discussing mediation as alternative to prosecution in simple rape cases).

27. *See* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 91 (1980) [hereinafter NJC FIELD TEST] (concluding that mediation provides satisfactory alternative to criminal justice system in general).

28. *See infra* notes 169-261 and accompanying text (discussing mediation as more healing and effective remedy for victim and offender in simple rape cases).

29. *See supra* notes 27-28 and accompanying text (discussing why people involved with resolution of simple rape cases should consider mediation as alternative to criminal justice system).

30. *See* M. Koss & M. HARVEY, *supra* note 1, at 24 (discussing unique aspects of rape as compared to other crimes).

31. *See id.* (discussing unique character of rape as violation of most private aspects of woman).

32. *See id.* (discussing how society often blames victim for occurrence of rape); R. WARSHAW, I NEVER CALLED IT RAPE: THE *Ms.* REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 22 (1988) (explaining why society sees rape victims as being responsible for their rapes).

33. *See* M. Koss & M. HARVEY, *supra* note 1, at 24 (discussing stigma that society places on rape victim).

34. *See id.* (discussing unique aspects of rape).

power over the woman.[35] As a result of this exercise of dominance and betrayal of trust, a rape victim experiences feelings of helplessness, anger, vulnerability, self-criticism, and guilt after the rape.[36] Victims of date and acquaintance rape experience these emotional reactions as intensely as do victims of aggravated rape because betrayal by a known and trusted person may be as terrifying, or more so, than a random attack.[37] In fact, the betrayal of trust combined with the violation of the victim's body compounds a simple rape victim's terror and emotional pain.[38]

The emotional trauma that all rape victims experience as feelings of powerlessness, anger, and betrayal manifests itself in a complex of symptoms that researchers characterize as rape trauma syndrome.[39] Rape trauma syndrome begins with a brief period of acute emotional disorganization for the victim.[40] During this period, a rape victim may suffer extreme fear, shock, anger, and anxiety, which she may either mask or express outwardly.[41] During the second phase of rape trauma syndrome, a victim begins to

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35. *See* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN & RAPE 256 (1975) (stating that all rape is exercise of power).

36. *See* Massaro, *supra* note 19, at 428 (explaining effect of rape on victim); Becker, Skinner, Abel, Howell & Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 106, 110 (1982) [hereinafter Becker & Skinner] (discussing effect of sexual assault on victim). The most prevalent acute stage symptom of rape trauma syndrome for both rape and attempted rape victims was experiencing feeling, especially fear and anger. *Id.* at 110. Twenty-five percent of the victims experienced feelings of self-blame. *Id.* at 111. At least 85% of completed rape victims continued to experience feelings of fear, anger, and self-blame one year after the attack. *Id.* Rape and attempted rape victims experienced similar short- and long-term problems. *Id.* at 112.

37. *See* Hughes & Sandler, *supra* note 1, at 6 (explaining effect of date and acquaintance rape on victims); M. Koss & M. HARVEY, *supra* note 1, at 42 (discussing post-rape adjustment for simple rape victims). Post-rape adjustment is equally as difficult for victims of simple rape as it is for victims of brutal rape. *Id.* In the case of simple rape, police, prosecutors, and society at large are likely to blame the victim for failure to resist or even accuse the victim of trying to cover up a consensual sexual encounter. *Id.* Women assaulted by men with weapons are less likely to be seen as at fault and will receive more support from the victims' families than victims of nonviolent rapes. *Id.* at 44. As a result, the victims of brutal rape experience less disruption in their personal lives as a result of the rape. *Id.*; *see* S. ESTRICH, *supra* note 9, at 25 (discussing effect of acquaintance rape on victim).

38. *See* S. ESTRICH, *supra* note 9, at 25 (discussing effect of acquaintance rape on victim); Hughes & Sandler, *supra* note 1, at 7 (discussing trauma of date rape).

39. *See* Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974) (reporting victims' descriptions of immediate and long-term effects of rape). Rape trauma syndrome is a stress reaction to the trauma of rape, which the victim perceives as a life-threatening situation. *Id.* The acute phase lasts for two to three weeks and is marked by disorganization. *Id.* Somatic reactions may include physical trauma, tension headaches, sleep disturbances, fatigue, startle reaction, gastrointestinal disturbance, and genitourinary problems. *Id.* Emotional reactions during the acute phase may include fear, humiliation, embarrassment, anger, desire for revenge, and self-blame. *Id.* at 983. A long-term phase that is marked by the victim's attempts to reorganize her life follows the acute phrase. *Id.* at 982.

40. *See id.* (describing emotional reactions of rape victims during initial acute phase of rape trauma syndrome).

41. *See id.* (describing emotional reactions of rape victims during initial acute phase of rape trauma syndrome).

reorganize and regain control over her life.[42] The fastest recovery for a victim occurs when the victim starts controlling her life again as soon as possible after the rape.[43] In addition to the disorganization and feelings of fear, shock, anger, and anxiety, a rape victim probably suffers from very low self-esteem as a result of the attack.[44]

In addition to being an emotionally devastating crime for the victim, rape is a seriously underreported crime, with estimates of reported rapes ranging from a low of five percent to a high of fifty percent.[45] The failure to report many simple rapes stems partly from the fact that a victim knows her rapist.[46] In such situations, victims tend to view their victimization as a private matter.[47] In crimes within relationships, victims may be reluctant to report or to press charges because the victims do not want the offender to be punished or because the victims fear hostility or retribution from the offender.[48] In addition, society assumes that adults take responsibility for the consequences of voluntary relationships.[49] As a result, a victim's family, friends, and society at large frequently blame the victim for the rape.[50] Because friends and family may blame the victim, the victim often suffers in her personal relationships as a result of reporting a rape.[51] A victim's

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42. *See id.* (explaining reorganization phase of rape trauma syndrome). The phase of rape trauma syndrome during which the rape victim tries to reorganize and regain control over her life usually begins several weeks after the assault. *Id.* Not all victims experience the same symptoms in the same order during the long-term phase of rape trauma syndrome. *Id.* at 983. Some symptoms may include making changes in residence or telephone number, seeking support from those close to her, dreams and nightmares, phobic reactions, and sexual fears. *Id.* at 983-84.

43. *See* H. BENEDICT, RECOVERY 83 (1985) (discussing victims' post-rape recovery).

44. *See id.* at 91 (discussing victims' post-rape recovery).

45. *See* Johnson, *supra* note 2, at 138 (discussing reporting rates for rape). Roughly one-half of those reporting sexual attacks to interviewers in Johnson's study indicated they also had reported the incident to police. *Id.* at 143-44. It is thus reasonable to accept conservative estimates that only one in five, or 20%, of rape incidents are reported. *Id.* at 144; *see* Hughes & Sandler, *supra* note 1, at 1 (discussing reporting rates for rape). Many experts estimate that as many as 90% of all rapes never are reported. *Id.* Of the small number of reported rapes, 60% of the victims know the assailant. *Id.*; *see* Fattah, *supra* note 17, at 32 (discussing victims' failure to report many crimes). Although rape is seriously underreported, many crimes in general go unreported. *Id.* The factors influencing nonreporting include a belief that the crime is too private for disclosure to authorities, fear of retaliation, confusion, a negative attitude toward police effectiveness and willingness to act, and a desire not to become involved with the criminal justice system. *Id.* Cases of rape seem to magnify many of these problems and other shortcomings inherent in the criminal justice system. *See infra* notes 46-146 and accompanying text (explaining problems in criminal justice system related to rape prosecution).

46. *See* Kanin, *supra* note 13, at 102 (discussing reasons for victims' failure to report acquaintance rape).

47. *See id.* at 103 (discussing reasons for victims' failure to report acquaintance rape).

48. *See* Wright, *supra* note 23, at 631 (explaining victims' failure to report crime).

49. *See* Kanin, *supra* note 13, at 103 (discussing reasons for victims' failure to report acquaintance rape).

50. *See id.* (discussing society's tendency to believe victim of date rape brought rape upon herself).

51. *See* R. WARSHAW, *supra* note 32, at 77-79 (discussing difficulties rape victims face in pressing criminal charges against rapists).

friends and family may be unable to give the victim needed emotional support or may even reject her.[52] A victim's husband or boyfriend may feel angry, confused, and anxious about his future sexual relationship with the victim.[53] Because of these possible reactions, a victim of simple rape risks tremendous personal upheaval as a result of reporting the rape.[54]

In addition to disrupted personal relationships, victims who choose to report a rape may have to endure police skepticism, particularly in a simple rape case.[55] As products of society, police officers share society's unique bias against rape victims.[56] As a result, a victim of simple rape may have to endure repetitive questioning about the rape itself as well as about her personal life and relationship with the rapist.[57] Police also may require her to submit to a lie detector test.[58] Even if a victim of simple rape reports the attack, police are unlikely to pursue the complaint because they do not believe that a rape occurred.[59]

Reported rape cases show great attrition as they move through the criminal justice system.[60] This high attrition rate is due in part to rigorous standards that police apply to screen reported rapes.[61] Police, prosecutors, and even the victims themselves before they report a simple rape, screen simple rape reports more strictly than they do other crimes by rigorously requiring fresh complaint, corroboration, force, and resistance.[62] Reported simple rapes often fail to meet the police's stringent standards because delayed reporting is normal behavior for a victim of simple rape.[63] In fact, the most common immediate response of a victim in an acquaintance rape

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52. *See id.* (discussing aftereffects of rape on victim's friends and family).

53. *See id.* at 75-77 (discussing aftereffects of rape on victim's husband or boyfriend).

54. *See id.* at 75-79 (discussing aftereffects of rape on victim's personal relationships).

55. *See* Massaro, *supra* note 19, at 422 (discussing difficulties rape victims face in pressing criminal charges against rapists).

56. *See id.* (discussing difficulties rape victims face in pressing criminal charges against rapists).

57. *Id.*

58. *Id.*

59. *See* S. ESTRICH, *supra* note 9, at 56 (discussing police bias against acquaintance rapes).

60. *See* M. KOSS & M. HARVEY, *supra* note 1, at 66 (explaining lack of prosecution of rape cases). Historically, the criminal justice system has eliminated most rape cases before trial. *Id.* In a study done in California in the mid-1970s, only 730 of an initial 22,400 instances of rape ended in a prosecution and a guilty verdict. *Id.* Of these, the state obtained only 166 without a plea bargain. *Id.* (citing Galvin & Polk, *Attrition in Case Processing: Is Rape Unique?*, 1983 J. RES. CRIM. & DELINQ. 126 (1983)). Galvin and Polk say that this rate of attrition is comparable to attrition rates for other felonies. *Id.* Other commentators believe that the attrition rate for rape is not comparable to other felonies and indicates police and prosecutorial indifference to the crime of rape. *Id.*

61. *See* S. ESTRICH, *supra* note 9, at 6 (explaining how victims and police screen rape cases prior to prosecution).

62. *See id.* (explaining how victims and police screen rape cases prior to prosecution).

63. *See id.* at 21 (discussing victims' normal post-rape behavior).

is to clean up and take time to decide, in light of the anticipated social stigma, difficulty in prosecuting, and her relationship with the rapist, whether to report the incident.[64] As a result, a fresh, or immediate, complaint and physical evidence that could corroborate the victim's claim of rape are lost.[65]

Additionally, a victim's resistance to the rapist's attempts at intercourse becomes especially important when the parties know each other.[66] However, the men most likely to commit date or acquaintance rape, such as a respected man in the community or a friend of the victim, often convey a psychological aura of authority and trust to the victim.[67] As a result, the rapist usually has no need for physical force until it is too late for the victim to respond effectively to her predicament.[68] By the time the victim realizes the rapist's intent, she has little opportunity to resist.[69] Women also may fail to decisively resist in situations of date and acquaintance rape as a result of conventional expectations of female behavior learned in childhood, such as politeness and femininity.[70] Therefore, a victim of simple rape frequently has difficulty proving to the satisfaction of the police and prosecutor that she did not consent to sexual intercourse with the rapist.[71] Thus, the social interaction of the victim and offender prior to the rape is one of the most important factors influencing the criminal justice system's screening of rape cases.[72]

Fact patterns including lack of resistance, prior relationship, lack of force, or absence of corroborating physical evidence may suggest to jurors that the victim consented or contributed to the rape by her behavior and thereby reduce the likelihood of conviction.[73] Consequently, screening out simple rape cases based on these fact patterns presumably leaves only the

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64. *See id.* (discussing victims' initial response to acquaintance rape).

65. *See id.* (discussing loss of corroborating physical evidence as result of victims' post-rape actions).

66. *See id.* at 19 (discussing need for proof of physical resistance in acquaintance rape).

67. *See* S. BROWNMILLER, *supra* note 35, at 256 (discussing lack of need for force in rape by man respected in community).

68. *See id.* (discussing lack of need for force in rape by man respected in community).

69. *See id.* (explaining that victim often fails to realize intent of rapist in time to resist forced intercourse).

70. *See id.* at 257 (explaining that physical resistance is not conventional learned feminine behavior).

71. *See* S. ESTRICH, *supra* note 9, at 18 (discussing difficulties simple rape victim faces in convincing criminal justice system that intercourse was nonconsensual).

72. *See id.* (discussing pre-prosecution screening of rape cases based on prior social relationship of victim and rapist); Borgida & White, *Social Perception of Rape Victims: The Impact of Legal Reform*, 2 LAW & HUM. BEHAV. 339, 349 (1978) (discussing screening of rape cases based on pre-rape social interaction of victim and rapist). Before the cases reach court, police or prosecutors often screen out the rape cases involving parties who are close friends or had been physically affectionate previously, failure to resist on the part of the victim, or the voluntary presence of the victim with the offender. *Id.* These types of cases result in few convictions even if they reach trial. *Id.*

73. *See* Borgida & White, *supra* note 72, at 343 (explaining that jurors infer victim consent from characteristics of rape, such as lack of force or resistance, or from victim-rapist relationship).

strongest cases for prosecution.[74] As compared to aggravated rape cases, cases in which the parties knew each other prior to the rape, such as simple rape cases, are the least likely to be considered real rapes and to be prosecuted.[75]

Even if a simple rape case reaches trial, a victim often faces grueling cross-examination by the defense attorney.[76] Especially in a simple rape case, testifying in court may be as psychologically painful for a rape victim as the rape itself.[77] In one study, the victims' desire to avoid the ordeal of courtroom testimony emerged as the primary reason for not pressing charges in rape cases.[78] Not only will a victim have to relive the ordeal in testifying about the crime, but the court and defense attorney will question her credibility on the issue of consent by stressing the lack of fresh complaint, lack of corroboration, and lack of force and resistance.[79] Partly as a result of the ordeal rape victims endure in the prosecution process, victims of simple rape are the least successful among all crime victims in proving their claims.[80] Even if prosecuted, convictions in rape cases in the absence of aggravating circumstances are extremely rare because of the lack of fresh

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74. *See* S. ESTRICH, *supra* note 9, at 17 (noting that pre-prosecution screening of rape cases eliminates all but strongest cases). Studies show that only one-fifth to one-third of felony arrests for rape end in conviction. *Id.* In general, the strongest rape cases for prosecution are aggravated rape cases. *Id.* Accordingly, conviction rates for rape reflect primarily prosecution of aggravated rapes. *Id.*

75. *See id.* at 4 (discussing lack of prosecution of acquaintance rapes). Police exercise substantial discretion in deciding which cases should be referred for prosecution. *Id.* at 15. Police decisions as to whether and how much to investigate affects the quality of evidence later available for trial or plea bargaining. *Id.* Police use their discretion to not investigate or refer for prosecution more often in simple rapes than in aggravated rapes. *Id.* at 16 (citing Chappell & Singer, *Rape in New York City: A Study of Material in the Police Files and Its Meaning*, in FORCIBLE RAPE 245 (D. Chappell, R. Geis & G. Geis ed. 1977). In New York, police consider 24% of acquaintance rapes to be unfounded, compared to less than 5% in rapes by strangers. *Id.* Conviction rates for rape similar to other felonies are not proof of equally vigorous prosecution for all rapes because rape conviction rates reflect primarily prosecution of aggravated rapes. *Id.* at 17.

76. *See* Massaro, *supra* note 19, at 422 (discussing grueling cross-examination rape victims face during trial of criminal charges against rapists).

77. *See* Borgida & White, *supra* note 72, at 339-40 (explaining effect on rape victim of testifying in court); Bohmer, *supra* note 22, at 303 (discussing criminal justice system's lack of concern for rape victims' trauma during trial testimony).

78. *See* Borgida & White, *supra* note 72, at 339 (concluding that some rape victims fail to report rape to avoid ordeal of testifying).

79. *See* H. BENEDICT, *supra* note 43, at 84 (asserting that disbelief of victim is very common in rape cases, especially in small towns or when victim and rapist were acquainted); R. WARSHAW, *supra* note 32, at 127 (discussing bias against rape victims on all levels of criminal justice system). Some rape crisis counselors advise victims of acquaintance rape not to press criminal charges at all because the bias against a victim when she and the rapist knew each other or had prior sexual contact is so strong at all levels of the criminal justice system. *Id.*

80. *See* Massaro, *supra* note 19, at 422 (discussing rape victims' lack of success in convicting men who raped them).

complaint, lack of corroboration, and lack of force and resistance.[81]

In addition to the other biases and problems present throughout the process of reporting and prosecuting a simple rape case, the biases of judges and juries further compound the obstacles to resolution of the case for a simple rape victim.[82] Like police and prosecutors, judges support and legitimize the exclusion of simple rape cases from prosecution.[83] One study has shown that judges accord women's testimony in general, and in acquaintance rape cases in particular, less credibility than men's testimony.[84] Therefore, even if a victim of simple rape has managed to convince police and prosecutors of the seriousness of her case, the judge in a bench trial is likely to disbelieve her testimony at trial.[85] In most rape cases, however, a defendant prefers a jury trial.[86] The bias of the judge affects a jury trial as well as a bench trial because the judge decides what evidence the jury will hear.[87] In addition, a judge's facial expressions and gestures can communicate to the jury the judge's belief or disbelief of trial witnesses.[88] Even aside from judge-induced bias, a jury carefully examines the woman's conduct in the history of the relationship and shows leniency to the defendant whenever the evidence reveals even suggestions of contributory behavior

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81. *See* S. ESTRICH, *supra* note 9, at 56 (discussing rarity of conviction in acquaintance rape cases as result of bias of courts and judges against prosecution in acquaintance rape cases).

82. *See infra* notes 83-91 and accompanying text (discussing bias of judges and juries as obstacle to resolution of simple rape cases).

83. *See* S. ESTRICH, *supra* note 9, at 26 (stating that judges support failure to prosecute cases of simple rape); Bohmer, *supra* note 22, at 304 (discussing judicial skepticism toward rape victims). Judicial skepticism toward rape victims results from a recognition of the complex legal issues involved, such as determination of victim consent and intent of the rapist, and from the belief that convicting an innocent man is the worst error the criminal justice system can commit. *Id.*

84. *See* MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 107 (1989) [hereinafter GENDER BIAS] (reporting results of survey of judges and attorneys regarding perceived gender bias in the court system). Of those expressing opinions, 21% of male attorneys, 31% of female attorneys, 11% of male judges, and 67% of female judges knew of cases in which gender affected the outcome of a case. *Id.* Most judges and lawyers agreed that male defendants had an advantage in rape prosecutions. *Id.* Both male and female attorneys reported problems with perception of female credibility. *Id.* Many female attorneys reported that women have problems being perceived as credible in acquaintance rape testimony. *Id.* at 108. The Committee reported no credibility problems as a result of gender for male litigants. *Id.* at 108. Fifty-one percent of female attorneys, 20% of male attorneys, and 9% of judges saw rape victims as being accorded less credibility than victims of other types of assault. *Id.* at 114 n.22.

85. *See* Bohmer, *supra* note 22, at 304 (discussing judicial skepticism toward rape victims).

86. *See* S. BROWNMILLER, *supra* note 35, at 373 (discussing rapists' preference for jury trial). Of all criminal prosecutions, rape ranks second only to murder in the percentage of defendants choosing a jury trial over a bench trial. *Id.*

87. *See* FED. R. EVID. 104 (stating that court will decide preliminary questions concerning admissibility of evidence).

88. *See generally*, Conner, *The Trial Judge's Demeanor: Its Impact on the Jury*, 13 JUDGE'S J. 2 (1974) (discussing effect of judges' behavior, including gestures, eye movements, and facial expressions, on juries' perception of credibility of witnesses).

by the woman.[89] In this circumstance, a jury generally will acquit or, if allowed to do so, convict the defendant of a lesser charge than rape.[90] In fact, one study revealed a jury conviction rate for simple rape of only three out of forty-two cases.[91]

Looking more broadly at the criminal justice system's problems in dealing with simple rape, the criminal justice system perpetuates the power structure underlying rape and rape laws by failing to resolve simple rape cases more effectively.[92] In the act of rape, the rapist forces his will upon the woman victim.[93] In its historical context, therefore, rape is a way in which men keep women under domination by keeping women in fear and by physically controlling women's bodies.[94] Traditional views of rape, including rape laws and stereotypes, have upheld men's domination of women through rape.[95] Instead of protecting women's rights to control their bodies and their sexuality, traditional views of rape serve to protect men from possible false accusations of rape by women that society assumes either to be scorned by the alleged rapist or to be covering up consensual sexual activity.[96] In fact, traditionally, many authorities in the criminal justice system have considered the duty to protect men from false accusations of rape to be more important than convicting offenders who have committed rape.[97] Consequently, although the American criminal justice system as a whole is designed to let the guilty go free rather than convict the innocent, the criminal justice system greatly exaggerates the need to protect men from false rape accusations.[98] In no other crime is the victim's credibility so

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89. *See* H. KALVEN & H. ZEISEL, *supra* note 3, at 249 (discussing jury's close scrutiny of rape victim's behavior). The jury redefines rape in terms of the victim's assumption of risk. *Id.*

90. *See id.* (discussing jury's reluctance to convict rapists). If allowed to do so, a jury may convict the defendant in a simple rape case of a lesser charge such as sexual assault. *Id.* The jury may not be saying the defendant did nothing wrong, but that he does not deserve conviction for a serious crime like rape. *Id.* at 254.

91. *See id.* at 253 (citing study of jury conviction rates for simple rape). In a study comparing judge and jury decisions in rape cases, the jury disagreed with the judge on the major charge of rape almost 100% of the time. *Id.* In 10 cases in which the judge and jury agreed to convict, the jury found the defendant guilty of a lesser charge, such as sexual assault, in all but one case. *Id.*

92. *See infra* notes 93-101 and accompanying text (discussing how criminal justice system perpetuates male-female power structure underlying rape).

93. *See supra* notes 34-35 and accompanying text (explaining that rape is act of power over victim).

94. *See generally* S. BROWNMILLER, *supra* note 35 (analyzing rape historically as resulting from and illustrating male domination of women); S. ESTRICH, *supra* note 9 (criticizing historical and recent treatment of acquaintance rape because of criminal justice system's failure to prosecute and convict acquaintance rapists).

95. *See* H. FEILD & L. BIENEN, JURORS AND RAPE 464 (1980) (explaining origin of rape law as protection for men).

96. *See id.* (arguing that rape law protects men).

97. *See id.* (contending that society prefers to protect men from false accusation at the cost of freeing rapists).

98. *See supra* notes 94-97 and accompanying text (suggesting that rape law has evolved to emphasize protection of men).

closely questioned.[99] Because rape is a serious crime, often with a mandatory minimum prison term, the criminal justice system must be certain that the man actually committed the crime.[100] However, thus far it has been unable to do so without subjecting the victim to additional unnecessary pain and humiliation.[101]

The pervasiveness of sexual violence in our society suggests that the cause of simple rape rests in what society defines as normal male-female interaction.[102] Traditionally, normal male-female relations are based upon a power structure in which men initiate interaction and women submit to that interaction.[103] Because men traditionally initiate most consensual sexual activity, the criminal justice system has found it difficult to distinguish consensual sexual relations from forced criminal sexual aggression, especially when the victim and rapist are acquainted and the sexual activity occurs as a result of intimidation rather than violence.[104]

To deal effectively with rape, the criminal justice system therefore must have some way to distinguish between consensual and nonconsensual intercourse.[105] When a potential victim and a potential offender interact, a process begins in which every word and behavior of the victim either helps or hinders the offender in committing the rape.[106] For example, a victim may not be sufficiently assertive by the offender's standards in communicating resistance, or a victim may act in a particular way that the rapist misinterprets or chooses to ignore.[107] Consequently, a date or acquaintance rape may occur as a result of miscommunication or the offender's lack of consideration for the woman's rights and wishes.[108] From the rapist's viewpoint, therefore, victims in many date and acquaintance rapes acted in a way that contributed to the occurrence of the rape, regardless of the victim's intentions.[109]

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99. *See* H. BENEDICT, *supra* note 43, at 121-22 (stating that only rape victims are expected to prove they did not ask to be victimized).

100. *See* VA. CODE ANN. § 18.2-61 (1950) (statute punishing rape by imprisonment for not less than five years to life).

101. *See supra* notes 55-91 and accompanying text (discussing criminal justice system's negative treatment of rape victims).

102. *See* Johnson, *supra* note 2, at 146 (linking cause of sexual violence to society's view of male-female interaction).

103. *See* S. BROWNMILLER, *supra* note 35, at 385 (noting that in traditional sexual relationships men initiate and women submit to sexual contact).

104. *See id.* at 384 (discussing inability of criminal law to distinguish between mutually desired sex and forced criminal sex).

105. *See* Bohmer, *supra* note 22, at 304 (discussing consent defense to rape charge).

106. *See* S. BROWNMILLER, *supra* note 35, at 353 (discussing interactionist dimension of rape); Kanin, *supra* note 13, at 99-102 (discussing date rapists' perceptions of rapist-victim interaction preceding rape).

107. *See* Hughes & Sandler, *supra* note 1, at 2 (discussing causes of date rape).

108. *See id.* (suggesting possible contributing factors in date rape).

109. *See* Kanin, *supra* note 13, at 105 (discussing victim's role in date rape); S. BROWNMILLER, *supra* note 35, at 353 (discussing idea that victim precipitates rape).

Inaccurate stereotypes of victim contribution based on the rapist's viewpoint are well entrenched in the criminal justice system.[110] The criminal justice system frequently accepts the defendant's contention that the victim of a simple rape actually consented to intercourse and later regretted her action or wished to retaliate against the man for some other wrong.[111] In addition, although false reporting rates for rape are no higher than for any other crime, the criminal justice system believes rape victims less often because of social ideas about women who report simple rape.[112] As a result, victims of simple rape must turn elsewhere if they want a remedy because the criminal justice system deals with the crime ineffectively and inaccurately determines whether a sexual encounter was consensual.[113]

In addition to perpetuating male dominance over women and ineffectively dealing with the consent issue in simple rape cases, the adversarial process on which the American criminal justice system is based denies participants control of their own situation while increasing the participants' dependence on outside authority.[114] Although a victim initially may control her situation by choosing to press criminal charges, she has little opportunity for decision-making beyond that point.[115] The prosecutor in a criminal case, not the victim, decides what action to take against the accused.[116] The prosecutor in a criminal case may not even consult the victim before the prosecutor decides to enter a plea bargain with the offender or to drop the case.[117] In the criminal context, the American system of justice dictates that concern for individual rights focus on the rights of the offender.[118] As a

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110. *See* Kanin, *supra* note 13, at 105 (discussing victim contribution concept); *supra* notes 55-91 and accompanying text (discussing bias against rape victim in criminal justice system).

111. *See* Bohmer, *supra* note 22, at 305 (discussing judges' beliefs that alleged acquaintance rape victims consented or are making false allegations).

112. *See* S. BROWNMILLER, *supra* note 35, at 387 (noting that false reporting rates for rape are same as for any other crime). Authorities estimate false reports of rape, as well as for other crimes, at about two percent. *Id.*; H. BENEDICT, *supra* note 43, at 84 (stating that official disbelief of rape victim is common, especially in small towns or when victim and rapist were acquainted).

113. *See supra* notes 102-12 and accompanying text (discussing criminal justice system's difficulty in determining consent of victim in rape cases).

114. *See* J. FOLBERG & A. TAYLOR, MEDIATION 11 (1984) (stating that litigation denies control to participants and increases participants' dependence on outside authority).

115. *See infra* notes 116-17 and accompanying text (discussing criminal prosecutor's decision-making authority).

116. *See* H. BENEDICT, *supra* note 43, at 116 (explaining process of criminal prosecution of rape).

117. *See id.* at 112 (stating that prosecutor may be indifferent to rape victim's opinion about handling of prosecution).

118. *See* U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures and requiring warrants to be issued based on probable cause); U.S. CONST. amend V (requiring indictment or information for serious crimes, prohibiting double jeopardy and compelled self-incrimination, and requiring due process of law before deprivation of life, liberty, or property); U.S. CONST. amend. VI (guaranteeing speedy trial, impartial jury, confrontation of witnesses, and assistance of counsel in all criminal proceedings); U.S. CONST. amend. VIII (prohibiting excessive bail, fines, and cruel and unusual punishment).

result, however, the justice system frequently overlooks the rights and needs of the victim.[119] To recover, a victim of simple rape needs to take control of her situation, which makes the victim's lack of control in the prosecution of a simple rape case especially damaging to the victim's recovery from the rape.[120] In addition to obstructing the victim's necessary recovery process, the victim-prosecutor relationship in which the victim is a passive recipient of the prosecutor's expertise reinforces the patterns of domination that are at the heart of the problem in crimes against women, such as rape.[121]

One of the legal profession's obligations is to heal human conflict.[122] In fulfilling this obligation, justice requires producing a result acceptable to society and to the parties involved quickly, inexpensively, and with minimal stress on those involved.[123] The criminal justice system fails to resolve interpersonal disputes in a healing manner because the system does not produce justice that is satisfactory to society and to the parties without great stress.[124] Instead of promoting healing, the adversary process in the American criminal justice system fails to deal with the hurt and anger of victims and inflicts emotional injury on victims and defendants.[125] In addition to increasing the parties' hurt and anger over the dispute, a court battle tends to focus hostility and harden anger until the disputants are rigidly polarized.[126] This rigid polarization is particularly unsatisfactory in simple rape cases because the victim and offender have been previously acquainted and may have continued contact after the rape and subsequent court experience.[127] By increasing hostility and polarizing the parties, the criminal justice system impairs the parties' ability to interact if future contact is necessary.[128]

In addition to increasing hurt and anger and polarizing the parties in a simple rape case, the criminal justice system, because it focuses on the facts

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119. *See supra* notes 55-91 and accompanying text (discussing criminal justice system's treatment of victims).

120. *See* H. BENEDICT, *supra* note 43, and 83 (discussing rape victim's need to take control of victim's life as soon as possible after rape).

121. *See* Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21, 30 (1984) (analogizing dependence of client on lawyer to domination of women in crimes such as rape).

122. *See* Burger, *Isn't There a Better Way ?*, 68 A.B.A. J. 274, 274 (1982) (asserting legal profession's obligation as healers of conflict).

123. *See id.* (discussing meaning of justice in terms of healing conflict).

124. *See* Rifkin, *supra* note 121, at 21 (discussing unsuitability of adversary process for resolving interpersonal disputes).

125. *See* Kellett, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 MO. J. DISPUTE RESOLUTION 111, 125 (1987) (explaining how adversary system of justice fails to resolve anger and creates emotional hurt).

126. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (discussing tendency of litigation to increase hostility between parties).

127. *See supra* notes 4-6 and accompanying text (explaining that simple rape occurs between previously acquainted parties).

128. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (discussing tendency of adversary system of justice to increase hostility and impair future interaction between parties).

surrounding a single past event, fails to help the parties identify and learn from the factors underlying the rape.[129] Except for the victim's behavior in a rape case, the broad societal context out of which the criminal act arose is irrelevant to the court.[130] Rather, the trial court's function is to find the facts of what happened at a specific time and place and to derive from those facts a finding of fault for the event.[131] To fulfill this function, the court cannot concern itself with the imbalance of power between the disputants, the communication skills of the victim and defendant, or the parties' possible need for healing and resolution.[132] The court looks at the victim as a witness who will relate the facts of what occurred.[133] As a result, disposition of the rape case usually ignores the underlying causes of the dispute.[134] Like the increased polarization of the parties, this failure to consider the underlying causes of the dispute and to help the parties learn new behaviors is especially problematic if the victim and offender must have continued contact.[135]

In addition to focusing on fact-finding in adjudicating the guilt of a criminal defendant, the trial court emphasizes the constitutional rights of the defendant to a fair trial and the individual rights of the rape defendant in terms of whether he was justified in committing the act with which he is charged.[136] In focusing on fact-finding and individual rights, the criminal justice system fails to accommodate what psychologists have identified as traditionally female concerns of justice and responsibility to others.[137] Women in general view disputes and dilemmas in terms of how resolving the disputes or dilemmas will affect personal and community relationships, rather than in terms of reason and individual rights.[138] Men, on the other hand, rely

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129. *See infra* notes 130-35 and accompanying text (explaining that criminal justice system focuses on finding facts regarding specific past event rather than on underlying causes for event).

130. *See* Felstiner & Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 LAW & HUM. BEHAV. 223, 225 (1978) (discussing courts' lack of concern for context of criminal dispute).

131. *See* H. FELD & L. BIENEN, *supra* note 95, at 182 (stating that criminal justice system is designed to process accusations against defendant).

132. *See id.* (discussing unimportance to trial court of factors not bearing on guilt of defendant).

133. *See* Felstiner & Williams, *supra* note 130, at 225 (explaining that court views crime victim as witness).

134. *See id.* (contending that frequent disposition of criminal cases without trial ignores underlying causes of dispute).

135. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 35-36 (discussing inability of legal system to help parties who have continuing relationship learn new ways of interacting). The victim might be forced to continue contact with the offender when the two are neighbors, attend the same school, or work together. *Id.*

136. *See supra* note 118 and accompanying text (stating that American system of justice requires concern for individual rights of criminal defendant).

137. *See generally* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (discussing work of various psychologists illuminating female as opposed to male moral development and concerns).

138. *See id.* at 29 (discussing differences in concerns between males and females in resolving moral dilemma).

on reason and law, including individual rights, to resolve disputes.[139] Because rape laws and the criminal justice system as a whole are based on the male viewpoint of reason, law, and individual rights, the criminal justice system fails to deal with victims of rape, a crime committed primarily against women, in a manner that women find to be healing and effective.[140]

Finally, the criminal justice system fails to reform a rapist even if it succeeds in convicting him.[141] Many incarcerated rapists continue to believe that they did nothing wrong except get caught for an activity in which many other men participate regularly.[142] The criminal justice system fails to reform rapists because, in part, the criminal justice system provides no opportunity for a rapist to see his victim as another human being.[143] In addition, a court trial does not allow the victim and offender to exchange their views of the event.[144] As a result, an offender may never understand his failure to heed the victim's resistance to the forced sexual intercourse.[145] Consequently, the criminal justice system fails to change the societal pattern of domination of women and perpetuates the problem of domination in male-female interaction.[146]

Since the mid-1970s, reforms in rape laws, such as redefinition of terms, rape shield statutes, and increased penalties, have affected judicial policy and practice.[147] However, laws that affect trial practices often are irrelevant to the problems facing victims who report simple rape because most simple rape cases never reach the courtroom.[148] In addition, rape law reform has failed to change the attitudes of those in the criminal justice system.[149]

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139. *See id.* (discussing male reliance on logic and law in resolving dilemmas).

140. *See supra* notes 136-39 and accompanying text (discussing failure of criminal justice system to accommodate female concerns).

141. *See* C. MACKINNON, FEMINISM UNMODIFIED 88 (1987) (discussing failure of criminal justice system to reform rapists).

142. *See id.* (discussing disbelief of incarcerated rapists that they were jailed for forcing sex).

143. *See* Martin, *A Different Kind of Justice*, 7 VICTIMOLOGY 237, 237 (1982) (stating that United States criminal justice system keeps victims and offenders strictly separated).

144. *Id.*

145. *See infra* notes 233-43 and accompanying text (discussing communication failure between victim and offender as possible contributor to occurrence of simple rape).

146. *See supra* notes 92-103 and accompanying text (discussing rape as result of societal structure in which men dominate women).

147. *See* Nemeth, *Legal Emancipation for the Victim of Rape*, HUM. RTS., Winter 1984, at 31 (discussing recent improvement in criminal justice system's treatment of rape victims).

148. *See* H. FEILD & L. BIENEN, *supra* note 95, at 178 (discussing inability of rape law reform to affect treatment of rape cases that frequently are not prosecuted).

149. *See* S. ESTRICH, *supra* note 9, at 80 (discussing failure of rape law reform to change attitudes of criminal justice system toward rape). In a study of rape law reform in Michigan, no increase in reporting or change in the way prosecutors decide whether to pursue rape charges occurred as a result of rape law reform. *Id.* at 88. The criminal justice system still pursued aggravated rapes most seriously and all but ignored simple rapes. *Id.* Prosecutors have not used a Washington state reform statute that provided for a third degree offense "where the victim did not consent . . . to sexual intercourse and such lack of consent was clearly expressed by the victim's words or conduct" to prosecute simple rapes. *Id.* at 89.

Although in most situations the sexual history of the victim no longer is admissible evidence, continued emphasis on force still places the blame for the rape on the victim for not resisting strongly enough and thus screens out cases of simple rape.[150] Accordingly, the characteristics that make an attack a simple rape, such as lack of violence and a previously acquainted victim and offender, still reduce the likelihood that the victim and the criminal justice system will view the attack as a real rape.[151] This view of the simple rape as less than a real rape continues to lessen the chances of receiving a serious police investigation, going to trial, and winning a conviction, despite the reforms in rape laws.[152] Thus, because rape law reform has failed to affect significantly the guilt determination process in the criminal justice system for simple rape cases, reforms that do not directly affect the guilt determination process may make the most significant improvements in how society deals with rape and rape victims.[153]

As an alternative to pursuing rape charges in the criminal justice system, a rape victim can file a civil suit against her attacker.[154] However, many of the problems that pervade the criminal justice system exist in the civil context.[155] A victim still may have to face public skepticism and blame, and endure embarrassing and invasive questioning during the discovery and court processes.[156] Although in a civil case a victim employs a lawyer as the victim's advocate, a victim still loses control of the resolution of the case in that she relies on the lawyer to assert her rights for her.[157] In addition,

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Prosecutors still dismiss simple rapes while charging aggravated rapes as first degree offenses. *Id.*

150. *See id.* at 80 (discussing lack of substantial change in criminal justice system's view of rape); FED. R. EVID. 412 (regarding relevance of victim's past sexual behavior in rape case). Federal Rule of Evidence 412, which Congress added in 1978, makes reputation or opinion evidence of past sexual behavior of alleged rape victim inadmissable evidence in most circumstances. *Id.*

151. *See* M. KOSS & M. HARVEY, *supra* note 1, at 13 (discussing common view by criminal justice system and society of simple rape as not real rape).

152. *See id.* (discussing small likelihood that state will prosecute simple rape).

153. *See* H. FEILD & L. BIENEN, *supra* note 95, at 460 (proposing that rape reform not affecting guilt determination of rapist may make greatest improvement in how society deals with rape).

154. *See* R. WARSHAW, *supra* note 32, at 144 (discussing civil suit as rape victim's alternative to criminal prosecution); H. BENEDICT, *supra* note 43, at 124 (discussing civil suit alternative for rape victims); Hughes & Sandler, *supra* note 1, at 7 (discussing civil alternative for rape victims).

155. *See supra* notes 55-91 and accompanying text (explaining difficulties rape victims encounter in criminal justice system).

156. *See supra* notes 49-54 and accompanying text (discussing society's tendency to blame victim for rape); *supra* notes 66-79 and accompanying text (discussing victim's difficulties in proving rape during criminal prosecution).

157. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981) (discussing zealous representation of client); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983) (discussing scope of representation of client); J. FOLBERG & A. TAYLOR, *supra* note 114, at 10-11 (discussing dependence of client on lawyer).

other difficulties arise.[158] A victim may have insufficient funds to pay a lawyer.[159] The offender may have little income or few resources, making a monetary recovery unlikely.[160] A civil suit generally takes longer to resolve than does a criminal case, thereby frustrating a victim's need to regain control of her life as quickly as possible.[161] In addition, the civil suit still may not resolve hurt and anger for either party and may even worsen these feelings.[162] Consequently, a civil action against a rapist may not be a better alternative than the criminal justice system.[163]

The criminal justice system fails in numerous crucial ways to deal effectively with the unique difficulties that simple rape cases present.[164] Reporting the rape and enduring the prosecution process unnecessarily distresses and humiliates a victim of simple rape.[165] Additionally, the criminal justice system perpetuates the existing power structure in which men dominate women.[166] The criminal justice system also fails to resolve the dispute between the parties in a healing or instructive fashion.[167] The problems inherent in the criminal justice system's current way of resolving simple rape cases reveal the need for devising a new, more efficient, and healing way to deal with simple rape cases.[168]

Mediation, which would avoid or minimize the problems found in the criminal justice system, provides an alternative to the existing method of handling simple rape cases.[169] At the same time, mediation provides a method of resolving simple rape cases that promotes healing for the parties and

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158. *See infra* notes 159-62 and accompanying text (explaining difficulties rape victims encounter in civil litigation).

159. *See* R. WARSHAW, *supra* note 32, at 145 (discussing financial responsibility of rape victim in civil suit); H. BENEDICT, *supra* note 43, at 125 (discussing financial responsibility of rape victim in civil suit).

160. *See* R. WARSHAW, *supra* note 32, at 145 (suggesting rapist may have few financial resources recoverable by victim in civil suit).

161. *See id.* (explaining that civil suit may take longer to resolve than criminal charge).

162. *See* Kellett, *supra* note 125, at 125 (discussing failure of adversary system to deal with parties' emotions in resolving medical malpractice suits). Criminal acts, such as rape, can involve a violation of trust, much like a medical malpractice situation. *Id.*

163. *See supra* notes 154-62 and accompanying text (discussing difficulties rape victim encounters in filing civil suit against rapist).

164. *See supra* notes 55-152 and accompanying text (discussing failure of criminal justice system to deal effectively with simple rape cases).

165. *See supra* notes 45-91 and accompanying text (discussing trauma simple rape victim endures in reporting and prosecuting simple rape case).

166. *See supra* notes 91-101 and accompanying text (discussing how criminal justice system perpetuates power structure underlying rape in which men dominate women).

167. *See supra* notes 122-34 and accompanying text (discussing failure of criminal justice system to resolve simple rape cases in healing and instructive manner for victim and offender).

168. *See supra* notes 45-153 and accompanying text (discussing problems in criminal justice system's treatment of simple rape cases).

169. *See* Bethel & Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 30 (1982) (discussing usefulness of mediation as remedy in cases of spouse abuse).

structural changes in society.[170] Mediation is a voluntary process in which a neutral third party with no authority to impose a solution helps parties reach a personalized agreement for resolving a dispute.[171] In each particular mediation the disputants' views of the event are more important than society's norms.[172] Additionally, mediation is not bound by precedent, rules of evidence or procedure, or substantive law.[173] Consequently, the participants in the mediation process are the ultimate authority.[174]

In addition, mediation defuses hostilities between the parties by promoting cooperation in a structured and supportive process.[175] The mediator facilitates discussion between the parties by encouraging each party to tell his or her side of the story and how he or she would like to see the problem resolved without interruption from the other party.[176] By disclosing their viewpoints and needs to each other under the guidance of the mediator, the parties can educate each other about each other's needs and viewpoints in an atmosphere that does not emphasize right and wrong or winning and losing.[177]

In mediation, the parties in a simple rape dispute retain the power to agree or not agree on what occurred, on the interpretation of the event, and on the resolution of the conflict.[178] Mediation often ends with a signed agreement, which in a simple rape case may include reconciliation, restitution for the victim, rehabilitation for whoever needs it, and the acceptance of responsibility by the offender.[179] Mediation is distinct from conciliation, an informal process in which the third party assists in bringing agreement by lowering tensions, improving communications, and interpreting issues.[180] Volatile conflicts and disputes in which the parties are unwilling or unpre-

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170. *See infra* notes 250-67 and accompanying text (discussing mediation as remedy that promotes healing for parties in simple rape cases and changes in society).

171. *See* L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 91 (abr. ed. 1988) (defining "mediation").

172. *See* Felstiner & Williams, *supra* note 130, at 223 (discussing importance of participants' views in mediation).

173. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (discussing emphasis of mediation on personalized solutions); Rifkin, *supra* note 121, at 27 (discussing irrelevancy of precedent and rules in mediation).

174. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (explaining that mediation participants are ultimate authority in mediation).

175. *See id.* (explaining reconciliation aspect of mediation).

176. *See id.* at 42 (discussing mediator's role in mediation as facilitator of discussion between participants).

177. *See id.* at 10 (discussing mediation as forum for exchange of views).

178. *See* Rifkin, *supra* note 121, at 25 (discussing power of mediation participants to agree or not agree on results).

179. *See* Wright, *supra* note 23, at 642 (suggesting possible results in mediation). In mediation, the release of feelings and dealing with the issues and concerns of the parties are more important than restitution for the victim. *Id.* at 636.

180. *See* AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, U.S. DEPT. OF JUSTICE, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 36 (1984) [hereinafter PATHS TO JUSTICE] (defining mediation and conciliation).

pared to mediate, as may be the case in simple rape, often require conciliation.[181]

The mediation process can go beyond simply settling a dispute in a process called therapeutic mediation, which recognizes underlying conflict and deals with its causes by encouraging the parties to discuss the factors leading up to the dispute.[182] Because the goal of therapeutic mediation is the participants' understanding and resolution of the underlying conflict as well as the resolution of the presenting dispute, the therapeutic mediation process emphasizes the emotional needs of the parties, their understanding of the causes of the conflict, and their acceptance of what happened.[183] Therapeutic mediation can be used in tandem with conciliation to provide an informal method of dispute resolution that may be more appropriate than formal mediation in some cases.[184]

Screening of rape cases prior to mediation is essential to maximize the possibility of a successful confrontation.[185] In existing mediation programs, mediators and law enforcement officials often distinguish cases suitable for mediation by screening out those involving serious violence or injuries,[186] a weapon, repetitive violence, or insufficient equality of bargaining power between the disputants.[187] Offenders with lengthy arrest records suggesting a sociopathic character also are unsuitable mediation candidates.[188] In addition to considering cases particularly inappropriate for mediation, the screening process should consider those cases particularly appropriate for mediation.[189] In simple rape cases, mediation may be appropriate when the rape is the first incidence of violence in the relationship.[190] Mediation also is appropriate when, as is the case in all simple rapes, the parties had a relationship prior to the rape because mediation emphasizes reconciliation

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181. *See id.* at 37 (describing use of conciliation).

182. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 132 (defining "therapeutic mediation").

183. *See id.* at 133 (explaining process of therapeutic mediation).

184. *See* PATHS TO JUSTICE, *supra* note 180, at 36-37 (discussing use of conciliation in combination with mediation).

185. *See* Martin, *supra* note 144, at 238 (discussing necessity of pre-mediation screening of cases).

186. *See* Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution On Women*, 7 HARV. WOMEN'S L.J. 57, 75 (1984) (describing cases inappropriate for mediation).

187. *See* Bethel & Singer, *supra* note 169, at 24 (describing cases inappropriate for mediation).

188. *See* Umbreit, *Victim Offender Mediation and Judicial Leadership*, 69 JUDICATURE 202, 204 (1986) (describing cases inappropriate for mediation); Kanin, *supra* note 13, at 98 (noting that date rapists generally are not violent individuals). Offenders in simple rape cases generally are not sociopaths. *Id.*

189. *See infra* notes 190-91 and accompanying text (discussing types of cases appropriate for mediation).

190. *See* Lerman, *supra* note 186, at 101 (suggesting that mediation may be appropriate in domestic violence situations if violence in relationship is not established pattern).

and provides a model for future interaction between the parties.[191]

A number of victim-offender reconciliation programs currently operate in the United States within the juvenile or criminal justice systems, offering face-to-face mediation between victims and offenders.[192] The process focuses on restitution as well as reconciliation of the conflict, expression of feelings, and a greater understanding by both parties of the event and each other.[193] Although most current reconciliation programs work with nonviolent offenders involved in crimes such as burglary or theft, some programs work with victims and offenders in violent crimes including assault, armed robbery, attempted manslaughter, and rape, because the mediators see a greater need for reconciliation in those cases.[194] Some mediators believe that victims of violent crime need to express intense feelings to the offender, to understand the event, and to move beyond bitterness toward acceptance of the experience.[195] Thus, the goal in victim-offender reconciliation programs is to confront the victim and offender with each other's humanness and to overcome distrust and hostility on each side.[196]

Victim-offender reconciliation programs seek justice by requiring an offender to face the consequences of the crime and allowing him to seek forgiveness from the victim and to make amends.[197] In addition, victim-offender reconciliation programs allow a victim to regain peace of mind by providing a victim with an opportunity to express feelings and to gain understanding of the crime and the offender.[198] Because simple rape is a traumatic experience that may result from miscommunication, both victim and offender can benefit from a process that allows expression of feelings and the opportunity to understand the event and each other.[199] The success of mediation in other areas of the criminal law indicates that, because the victim and offender in a simple rape case have the same need to express emotions and gain understanding of each other as victims and offenders in

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191. *See* Houston, *The Boston Municipal Court Mediation Program: Mediating Criminal Complaints*, BOSTON B.J., May-June 1984, at 29, 30 (discussing appropriateness of mediation when disputing parties have prior relationship); J. FOLBERG & A. TAYLOR, *supra* note 114, at 13 (suggesting that mediation is useful when disputing parties have prior relationship).

192. *See* Umbreit, *supra* note 188, at 202 (discussing success of two victim-offender mediation programs began by judges). A survey in the mid-1980s by the PACT Institute of Justice in Valparaiso, Indiana, found 32 victim-offender reconciliation programs in the United States. *Id.*

193. *See id.* (describing focus of victim-offender reconciliation programs).

194. *See id.* at 203 (discussing crimes suitable for mediation); Wright, *supra* note 23, at 639 (suggesting that real need for reconciliation exists in crimes such as sexual assault).

195. *See* Martin, *supra* note 144, at 239-40 (suggesting that victims of violent crimes need opportunity for reconciliation).

196. *See id.* at 238 (discussing goal of victim-offender reconciliation programs).

197. *See id.* at 241 (explaining approach of victim-offender reconciliation programs).

198. *See id.* (describing benefits for victims in victim-offender reconciliation programs).

199. *See id.* at 239-40 (discussing benefits of victim-offender reconciliation programs for victims and offenders).

other types of crime, mediation also would provide a successful alternative to the criminal justice system in simple rape cases.[200]

The goals of mediation in the context of a simple rape case are primarily threefold.[201] First, mediation attempts to reduce the anxiety and negative effects of the conflict for both parties, but because the victim's emotional trauma is likely to be more intense than the offender's, especially for the victim.[202] Second, mediation attempts to help the parties to accept the event by allowing the parties to fully express negative emotions about the dispute.[203] Third, mediation may attempt to help the parties to produce an agreement for the future that both parties can accept.[204] Other objectives may be to identify important issues between the parties, minimize placing of blame on either party, and maximize the parties' understanding of the social and behavioral context in which the rape occurred.[205] By concentrating on potential areas of agreement between the parties, the mediation process helps build the desire of the parties to reach a mutually acceptable settlement that will help both parties recover from the rape.[206]

Mediation is more beneficial to a victim of simple rape than the adversarial alternative that the criminal justice system offers because mediation better meets the special needs that a simple rape victim has.[207] When the opportunity for mediation would arise, a rape victim likely would be in the phase of recovery during which she is trying to reorganize and regain control over her life.[208] During this time in a victim's recovery process, the self-esteem and sense of competence participants gain from the mediation process help to provide a sense of control for a victim of simple rape.[209] Engaging in a healing process, such as mediation, that can help the victim to regain control of her life may serve a rape victim better than engaging in or continuing in legal combat.[210] Unlike the court system, mediation allows the participants control over the result of the dispute.[211] Consequently,

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200. *See supra* notes 192-99 and accompanying text (discussing benefits of mediation in victim-offender reconciliation programs).

201. *See infra* notes 202-04 and accompanying text (describing goals of mediation in simple rape case).

202. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 8 (discussing goals of mediation).

203. *Id.*

204. *Id.*

205. *See* Bethel & Singer, *supra* note 169, at 15 (discussing objectives of mediation in domestic violence disputes).

206. *See id.* (explaining that mediation helps parties agree to settle dispute).

207. *See infra* notes 208-23 and accompanying text (discussing how mediation meets special needs of simple rape victims).

208. *See* Burgess & Holmstrom, *supra* note 39, at 983 (explaining duration of phases of rape trauma syndrome).

209. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 11 (discussing benefits of mediation process for participants).

210. *See* Ackerman, *Defamation and Alternative Dispute Resolution: Healing the Sting*, 1986 Mo. J. DISPUTE RESOLUTION 1, 28 (1986) (discussing benefits of healing process of mediation in defamation suits).

211. *See* L. RISKIN & J. WESTBROOK, *supra* note 171, at 91 (stating that mediation allows participants control over resolution of dispute).

mediation helps a victim of simple rape in her recovery process, while the criminal justice system does not.[212]

In addition to the need for control, victims overcome the rape experience more effectively when they can develop a rationale for why the rape happened.[213] Learning how the rape might have been related to her actions suggests to a victim that she can control the future likelihood of being raped.[214] A victim of rape recovers faster when she believes the rape was related to her actions than when she believes the rape occurred because she deserved it or was a bad person.[215] Mediation helps the victim develop the necessary rationale for the event by allowing the victim to learn why the offender believes he committed the rape.[216] In developing this rationale, however, mediators must avoid placing the blame on the victim for the attack because, in actuality, the victim is not at fault.[217]

Additionally, mediation provides the opportunity for the offender to apologize to the victim, a crucial ingredient in resolving conflict and repairing relationships.[218] By apologizing, an offender expresses his remorse to the victim.[219] Apology is important because it allows an offender to deal with any guilt he feels and restores him in his own mind to a position of good standing in the community.[220] In addition, apology may dissipate a victim's hostility toward the offender.[221] Some victims of simple rape want an apology from the offender more than they want restitution or retribution, perhaps as a result of women's emphasis on relationship over individual rights.[222] Mediation provides an ideal forum for apology because mediation

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212. *See supra* notes 114-21 and accompanying text (discussing failure of criminal justice system to aid rape victim in recovery process).

213. *See* M. KOSS & M. HARVEY, *supra* note 1, at 45 (discussing benefit to rape victim of understanding how rape happened).

214. *Id.*

215. *See id.* (discussing how speed of recovery depends on how victim views rape); H. BENEDICT, *supra* note 43, at 2 (same).

216. *See infra* notes 102-09 and accompanying text (discussing victim-rapist interaction and miscommunication as explanation for simple rape). The victim of simple rape can develop a rationale for why the rape happened by means other than mediation, such as individual counselling or participation in a support group. *See* R. WARSHAW, *supra* note 32, at 187 (discussing counselling for rape victims). However, such means require speculation about why the offender committed the rape. *Id.* As a result of this speculation, the victim may retain doubts about her own behavior. *Id.*

217. *See* N. GROTH, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 82 (1979) (stressing importance of not blaming victim for rape).

218. *See* Kellett, *supra* note 125, at 126 (discussing importance of apology in resolving medical malpractice suits through mediation).

219. *See id.* at 126-27 (discussing effect of apology during mediation).

220. *See* Martin, *supra* note 144, at 240 (discussing belief of some criminologists that many crimes result from offender's feelings of rejection by community).

221. *See* Kellett, *supra* note 125, at 126-27 (discussing effect of apology during mediation).

222. *See generally* C. GILLIGAN, *supra* note 137 (discussing women's emphasis on relationship and connection).

is private and confidential, and an apology will not be viewed officially as an admission of guilt.[223]

In addition to meeting the special needs of rape victims, the use of mediation can eliminate many of the difficulties that cause victims not to report rape.[224] A victim may choose to report the rape if she knows that a remedy which is sympathetic and fair is available.[225] Although mediation may be unsuccessful in affecting those victims of simple rape who choose not to report the rape to avoid a hurtful reaction from family and friends, the use of mediation may affect victims of simple rape who presently choose not to report so that they can bypass the additional stress the criminal justice system creates.[226] For example, the use of mediation would diminish the need for rigorous police questioning because mediation provides a remedy that does not adjudicate the offender's guilt.[227] Additionally, the use of mediation would not require police willingness to pursue investigation of the rape charge.[228]

Mediation also avoids many of the other problems that pervade the criminal justice system in a simple rape case.[229] The use of mediation would avoid the victim's trauma during court testimony.[230] In addition, mediation provides an escape from a court system that frequently is biased, or perceived to be biased, against women because judge and jury biases against rape victims are immaterial in mediation.[231] Consequently, mediation provides an alternative to the judicial system for cases which that system now sees as unsuitable for prosecution because of societal bias.[232]

In addition to avoiding criminal justice system bias, mediation can confront underlying causes for an event, while courts can deal only with

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223. *See* Kellett, *supra* note 125, at 130 (proposing that mediation provides ideal forum for apology).

224. *See infra* notes 225-28 and accompanying text (explaining how mediation can eliminate many problems found in criminal justice system that cause victims not to report rape).

225. *See supra* notes 55-91 and accompanying text (discussing problems with criminal justice system that help cause victims' failure to report rape).

226. *See infra* notes 227-32 and accompanying text (explaining how mediation may cause more victims to report simple rape).

227. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (explaining that mediation does not adjudicate guilt of offender).

228. *See id.* (explaining that mediation does not determine guilt or innocence of parties).

229. *See infra* notes 230-32 and accompanying text (explaining how mediation avoids many problems that pervade criminal justice system in simple rape case).

230. *See supra* notes 171-77 and accompanying text (explaining how mediation is private, supportive process without emphasis on right and wrong in which victim can speak without interruption).

231. *See* Lerman, *supra* note 186, at 71 (discussing mediation as escape from court system that discriminates against women).

232. *Cf.* Bethel & Singer, *supra* note 169, at 32 (discussing mediation as alternative to court system for victims of spouse abuse); *see supra* notes 62-73 and accompanying text (discussing characteristics of rape cases that criminal justice system now sees as unsuitable for prosecution).

the presenting complaint.[233] In a simple rape case, one conflict underlying the rape might involve a failure of communication between the victim and offender that resulted in the rape.[234] Therapeutic mediation would deal with the underlying communication failure in addition to the rape dispute itself.[235] Because simple rape cases may involve volatile conflicts with underlying issues encompassing the parties' prior relationship, communication problems, and violation of trust, mediation of simple rape cases would involve a combination of therapeutic mediation and conciliation.[236] By dealing with causes underlying a conflict, mediation attempts to gain a more permanent solution involving a change in the way the parties relate to each other rather than simply disposing of the current dispute on the basis of the facts as the criminal justice system does.[237] As a result, mediation is better suited than the criminal justice system to deal with crimes such as simple rape in which the victim and offender knew each other prior to the event.[238]

In contrast to the criminal justice system, which fails to allow the parties to identify behavior patterns that they can change to lessen the chance of a recurrence of the rape, mediation encourages the participants to learn a new way of interacting with each other.[239] Mediation can help the offender understand his failure to perceive and heed the woman's signals.[240] Mediation also can help the victim to see how the offender saw her behavior.[241] Although mediation helps the victim to understand how the offender misconstrued her behavior, mediation does not shift responsibility to the victim for the rape.[242] However, understanding the offender's viewpoint illuminates for the victim how simple rape may occur as a result of male-female interaction.[243]

Mediation increases the range of choices available to a rape victim when she initially reports a rape by allowing her to choose between criminal

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233. *See* Felstiner & Williams, *supra* note 130, at 234 (discussing mediation's ability to deal with underlying causes of conflict).

234. *See supra* notes 102-09 and accompanying text (discussing communication failure between victim and rapist resulting in rape).

235. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 132 (explaining process of therapeutic mediation).

236. *See supra* notes 34-38 and accompanying text (discussing violation of trust in acquaintance rape); *supra* notes 102-09 and accompanying text (discussing communication failure between victim and rapist).

237. *See* Felstiner & Williams, *supra* note 130, at 234 (discussing attempt in mediation to develope permanent solutions to conflict).

238. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 13 (discussing suitability of mediation for use in disputes when parties knew each other).

239. *See* Felstiner & Williams, *supra* note 130, at 234 (discussing mediation's ability to help participants learn new ways of interacting with each other).

240. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (discussing mediation as forum for exchange of viewpoints).

241. *See id.* (discussing mediation as forum for exchange of viewpoints).

242. *See* S. BROWNMILLER, *supra* note 35, at 353 (asserting that victim is not responsible for rape); Kanin, *supra* note 13, at 105 (denying that victim is at fault in date rape).

243. *See* Kanin, *supra* note 13, at 105 (explaining interactionist dimension of rape).

prosecution, a civil suit, or mediation.[244] Additionally, in contrast to the criminal justice system, mediation allows a victim continued exercise of choice in the resolution of the conflict and greater control over the process of conflict resolution.[245] By extension, mediation empowers the participants, particularly the victim, to become more in control of their lives by emphasizing their own responsibility for making decisions that will affect them.[246] Mediation therefore provides a forum in which women may assert their own rights rather than rely on the legal system to do it for them.[247] As a result, mediation provides a victim of simple rape an opportunity, lacking in the criminal justice system, to relinquish the passive and submissive role that society socializes many women to accept.[248]

Mediation emphasizes the traditionally female concerns of responsibility and justice over the traditionally male concern in the legal setting for individual rights.[249] In emphasizing responsibility and justice, mediation focuses on increasing communication between the disputing parties and on reconciliation of the parties.[250] Because of this focus on communication and reconciliation, mediation shifts the focus of the dispute from individual rights to concern for the healing of the individuals and perhaps the relationship involved.[251] As a result, mediation provides an appropriately female solution to rape, a problem that predominately burdens females.[252]

In addition to assisting a victim of simple rape, mediation may aid in reforming an offender more satisfactorily than the criminal justice system.[253] Rapists use sexuality to express anger or power.[254] Yet, date rapists primarily

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244. *See* Bethel & Singer, *supra* note 169, at 32 (stating that mediation provides another choice of remedy to victims of wife abuse).

245. *See id.* (stating that mediation provides continued control in resolution of conflict for participants). The argument that mediation allows the victim continued exercise of choice in the resolution of the conflict assumes that the offender is willing or can be required to participate in the mediation. *See infra* notes 268-73 and accompanying text (discussing participation of offender in mediation).

246. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 8 (discussing empowering effect of mediation on participants).

247. *See supra* notes 114-21 and accompanying text (discussing rape victim's lack of control in legal system); *supra* notes 171-78 and accompanying text (discussing participants' control of outcome in mediation).

248. *See supra* notes 244-47 and accompanying text (discussing how mediation provides rape victim opportunity to assert own rights).

249. *See* Rifkin, *supra* note 121, at 24 (discussing mediation as embracing traditionally feminine values).

250. *See id.* (discussing mediation as process of discussion and reconciliation between parties).

251. *See supra* notes 192-223 and accompanying text (explaining mediation's emphasis on healing of parties involved).

252. *See supra* notes 249-51 and accompanying text (discussing how use of mediation in simple rape cases accommodates female concerns).

253. *See* Williams, *Reparation and Mediation in the Criminal Justice System*, 136 NEW L.J. 1106, 1107 (1986) (discussing mediation as type of rehabilitation for offender); Martin, *supra* note 144, at 240 (describing psychological purpose of mediation for offenders).

254. *See* N. GROTH, *supra* note 217, at 13 (discussing rape as expression of anger or

are middle class with no conspicuous history of violence.[255] Feelings of worth for date rapists, however, are closely associated with sexual conquest.[256] Their assaults seem to result from sexual interaction with the victim based on a socially determined power structure in which males initiate sex and females respond, rather than from the offender's individual psychological condition.[257] Simple rapists do, however, share, more so than other men, the problem of difficulty in interpersonal relationships.[258] Most offenders have difficulty dealing with anger, frustration, and anxiety.[259] In addition, offenders may need assistance in becoming more in touch with other people.[260] Mediation can help the offender to interact more effectively with others by teaching the offender clearer communication skills and by exposing the offender to the victim's viewpoint.[261]

Perhaps the most desirable outcome of implementing mediation as an alternative or the criminal justice system for simple rape is that mediation may change societal causes of rape faster than waiting for the legal system to adopt new attitudes regarding women.[262] Presently, the legal system helps to perpetuate rape by requiring women to be blameless victims before their rights can be redressed.[263] Mediation, because it does not determine the guilt or innocence of the offender, exposes the offender to the victim's viewpoint in a nonthreatening atmosphere.[264] In addition, mediation avoids placing blame for the dispute on either party.[265] As a result, women whom the

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power); Segal & Stermac, *A Measure of Rapists' Attitudes Towards Women*, 7 INT'L J.L. & PSYCHIATRY 437, 440 (1984) (reporting on psychological testing of incarcerated rapists regarding attitudes toward women). Segal and Stermac found attitudes toward women among incarcerated rapists to be similar to those of non-sex offender inmates and males in the community of similar socioeconomic status. *Id.* However, incarcerated rapists as a group are not so exceptionally conservative or negative in their attitudes toward women as to make mediation unadvisable. *Id.*

255. *See* Kanin, *supra* note 13, at 98 (describing characteristics of date rapists on college campus).

256. *Id.*

257. *See id.* (suggesting date rape occurs as result of social rather than psychological conditions).

258. *See* N. GROTH, *supra* note 217, at 218 (discussing shared characteristics of rapists).

259. *Id.*

260. *See id.* (describing rapists' need for help with interpersonal skills).

261. *See* Martin, *supra* note 144, at 238 (describing goal of victim-offender rehabilitation programs as helping parties to understand each other); J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (suggesting that mediation can educate participants about each other's needs); Felstiner & Williams, *supra* note 130, at 243 (describing mediation as forum for learning communication skills).

262. *See infra* notes 263-67 and accompanying text (discussing ways in which mediation may change societal causes of simple rape).

263. *See* MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, reprinted in* CRITICAL LEGAL STUDIES 56, 66 (A. Hutchinson ed. 1989) (arguing that legal system perpetuates rape); *supra* notes 66-73 and accompanying text (describing how criminal justice system sees rape victim as to blame for rape).

264. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (explaining that mediation's purpose is to minimize finding of fault for dispute).

265. *See id.* (explaining that mediation avoids placing blame for dispute on either party).

criminal justice system now views as having contributed to their rape can obtain a resolution of the rape through mediation, even if the women are denied resolution through the court system.[266] Through this resolution, the victim exposes the offender to the victim's viewpoint, which may initiate a change in the offender's viewpoint.[267] Society, consequently, can change offender by offender.

Of course, the use of mediation in simple rape cases that are unlikely to be prosecuted may depend on the voluntary good faith participation of the offender.[268] Police or prosecutors may refer cases to mediation when they have sufficient evidence to prosecute but a conviction is unlikely, as is often the case with simple rape.[269] However, an offender may choose to participate because mediation is the least objectionable of the alternatives available.[270] In simple rape cases, mediation gives an offender the chance to avoid the social stigma of a rape prosecution or investigation, including unfavorable media attention and being labelled a rapist by the victim and others.[271] Furthermore, mediation offers the opportunity for an offender to confront his accuser.[272] The possibility of police involvement, court action, media attention, or being labeled a rapist by the victim and others may induce an offender to participate.[273]

To protect innocent alleged rapists, mediation programs must consider the confidentiality of the proceeding and whether an offender will believe the process is pressuring him to admit guilt.[274] Due process protections for an offender may be required during the mediation process if the mediation is used as a tool of the state or if the offender could be subjected to further legal sanction.[275] However, the legal problems requiring solution appear to

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266. *See supra* notes 263-65 and accompanying text (discussing how victims of simple rape who society sees as to blame for rape can resolve rape case through mediation).

267. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (discussing mediation as forum for exchange of viewpoints).

268. *See* PATHS TO JUSTICE, *supra* note 180, at 14 (explaining that use of mediation may depend on voluntary participation of parties).

269. *See supra* notes 60-73 and accompanying text (discussing factors in simple rape that make prosecution and conviction of rapist unlikely); *cf.* Cloke, *Date Rape and the Limits of Mediation*, 21 MEDIATION Q. 77 (Fall 1988) (describing mediation of college date rape case that was referred to mediation when neither prosecutor nor college thought there was enough evidence to prosecute).

270. *See* Bethel & Singer, *supra* note 169, at 19 (discussing offender's motivation to participate in mediation).

271. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 10 (explaining that mediation does not determine fault for dispute); *infra* note 273 and accompanying text (suggesting avoidance of court involvement as offender's motivation to participate in mediation).

272. *See* U.S. CONST. amend. VI (guaranteeing criminal defendant opportunity to confront witnesses against him).

273. *See* Bethel & Singer, *supra* note 169, at 19 (describing factors that may motivate offender to participate in mediation).

274. *See* Wright, *supra* note 23, at 640 (discussing protections for potential criminal defendants in mediation).

275. *See* Rice, *Mediation & Arbitration as a Civil Alternative to the Criminal Justice System—An Overview & Legal Analysis*, 29 AM. U.L. REV. 17, 29 (1979) (analyzing necessity for due process protections in mediation).

be minimal, especially when balanced against the potential benefits of mediation programs and the formidable problems with the criminal justice system in relation to simple rape cases.[276]

Mediation generally is appropriate when the disputants are equally powerful.[277] Thus, in rape mediation concern arises for women who traditionally are less powerful than men and may risk being treated unfairly.[278] This view, however, continues to cast women as less powerful and assumes women always need to rely on a more powerful authority to protect their rights.[279] Although usually used when disputants are equally powerful, mediation has proven effective in situations of great power disparity, such as in environmental and personal injury disputes.[280] Thus, absolute equality is not always essential.[281] The mediator often can correct any imbalance by holding private sessions with each party, educating the parties about their legal rights, and intervening to help a less articulate party communicate or to remind the parties of the need for equality in decision-making.[282] Mediation thereby can provide a rape victim with a forum in which she has, or can achieve, equality of power with the man who raped her.[283]

Many objections to the use of mediation in situations such as rape are based on hypothesis rather than on actual negative experience with mediation in those situations.[284] In addition to the argument that women have insufficient equality of bargaining power to mediate successfully with a rapist, other objections to the use of mediation in rape cases are that mediation of rape cases might perpetuate the myth that women ask for rape and that rape victims might not want to mediate a rape case.[285] However, rules

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276. *See id.* at 81 (concluding that legal problems with mediation are minimal).

277. *See* L. RISKIN & J. WESTBROOK, *supra* note 171, at 115 (discussing proposition that mediation participants must be equally powerful). This idea that mediation is appropriate in situations of equal power results from mediation's lack of reliance on rules of law and procedure, precedent, or legal rights and protections. *Id.* As a result, some authorities believe less powerful individuals risk being treated unfairly in mediation. *Id.*

278. *See* PATHS TO JUSTICE, *supra* note 180, at 15 (discussing risk that traditionally less powerful groups, such as women, will be treated unfairly in mediation).

279. *See supra* notes 114-21 and accompanying text (discussing dependence of rape victim on prosecutor or lawyer).

280. *See* L. RISKIN & J. WESTBROOK, *supra* note 171, at 116 (describing use of mediation with participants who are not equally powerful).

281. *See* Bethel & Singer, *supra* note 169, at 19 (arguing that absolute equality between mediation participants is not essential).

282. *See id.* at 20 (describing means by which mediator can correct power imbalance between mediation participants); J. FOLBERG & A. TAYLOR, *supra* note 114, at 185 (explaining methods mediators can use to correct inequality between mediation participants).

283. *See supra* notes 244-48 and accompanying text (discussing empowering aspect of mediation as forum in which women can assert own rights); *supra* notes 277-82 and accompanying text (discussing equal power concept in mediation).

284. *See* Cloke, *supra* note 269, at 83 (indicating that objections to use of mediation in date rape cases are based upon hypothesis rather than experience).

285. *See* Letter from Eileen Stewart, Asst. Dean of Students, U. Mass. Amherst to Deborah Gartzke Goolsby (Nov. 9, 1989) (discussing reasons for campus policy of not mediating rape cases).

regarding when mediation is appropriate that are based on hypothesis rather than experience may prevent the use of mediation in situations in which it could alleviate suffering.[286]

Some women's advocates believe that, because new laws have expanded womens' legal rights in various areas, including rape, efforts should concentrate on expanding women's access to the court system instead of diverting them from it.[287] These advocates view mediation as another way in which the criminal justice system can continue to bar women from access to court remedies.[288] However, given the limited success of rape reform legislation in changing the attitude of the court system toward rape victims, denying women access to a method of resolving their trauma while waiting for the criminal justice system to adopt new societal values seems needlessly cruel.[289]

Some may allege that diverting rape cases to mediation amounts to tacit decriminalization of simple rape.[290] However, the criminal justice system now often responds to cases of simple rape, including date and acquaintance rape, by declining to charge, prosecute, or convict the offender.[291] This response already decriminalizes the act by refusing to acknowledge its harmfulness to the victim and to society, and by in effect giving the rapist its permission to continue.[292] Disallowing access to mediation on this basis would be denying women access to yet another remedy.[293]

Public acceptance of mediation in rape cases depends in part upon educating potential users and the quality of the mediators.[294] Many estab-

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286. *See* Cloke, *supra* note 269, at 83 (arguing that mediation should be considered as remedy for sexual violence); L. RISKIN & J. WESTBROOK, *supra* note 171, at 117 (stating belief that a priori rules about appropriate use of mediation are undesirable).

287. *See* L. RISKIN & J. WESTBROOK, *supra* note 171, at 116 (quoting Lefcourt, *Women, Mediation & Family Law*, CLEARINGHOUSE REVIEW, July 1984, at 266) (contending that women should not be diverted from access to court system merely to increase court efficiency and reduce costs).

288. *See* Lerman, *supra* note 186, at 89 (criticizing mediation as colluding with law enforcement to bar women from access to courts). Lerman argues that in the wife abuse context mediation "not only fails to protect women from subsequent violence but also perpetuates their continued victimization." *Id.* at 61. *But see* Bethel & Singer, *supra* note 169, at 21 (contending that victims of domestic violence are not necessarily without power in mediation). Bethel and Singer assert that Lerman's argument assumes repeated serious victimization of the wife by her spouse. *Id.* When violence is not repetitive or is a minor part of the relationship, the victim is not necessarily hopelessly disadvantaged. *Id.* at 19. She may have sufficient personal strength to seek change in the relationship. *Id.*

289. *See supra* notes 147-53 and accompanying text (discussing limited success of rape reform efforts to change attitude of court system toward rape victims).

290. *See* Lerman, *supra* note 186, at 92 (arguing that use of mediation in domestic violence context amounts to tacit decriminalization of wife abuse).

291. *See supra* notes 55-91 and accompanying text (describing failure of criminal justice system to prosecute and convict rapists).

292. *See supra* notes 55-91 and accompanying text (discussing failure of criminal justice system to prosecute and convict rapists).

293. *See supra* notes 169-84 and 207-67 and accompanying text (discussing mediation as alternative remedy for simple rape).

294. *See* PATHS TO JUSTICE, *supra* note 180, at 23 (discussing potential for public acceptance of mediation).

lished mediation programs in other areas of law report a high success rate in adherence to agreements[295] and a high degree of participant satisfaction.[296] In particular, women involved in mediation of divorce and sexual harassment situations have felt that mediation altered to their advantage the previous dominance and power aspects of their relationship with the other party.[297] Even when they do not reach agreement, mediation participants feel better about the process as compared to the court system.[298] One reason for this approval of the mediation process is that mediation produces mutual gain in the resolution of a dispute.[299] Participants also prefer the mediation process to the court system because mediation empowers the participants and respects their autonomy.[300] This empowerment and respect for the parties' autonomy is especially important to the victim of simple rape, who needs to regain control of her life as quickly as possible.[301]

Even when mediation is more familiar to the public as an alternative method of resolving simple rape cases, some rape victims will not want to participate.[302] Some victims, for example, may not feel psychologically or physically able to confront their attacker face to face in a mediation setting.[303] However, victims of simple rape do have an interest in healing, which may come only when the victims can release their fear and anger.[304] Therefore, although mediation can assist in this process of healing, a rape victim never should be pressured to use mediation, as part of the purpose

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295. *See* Martin, *supra* note 143, at 240 (reporting success of victim-offender reconciliation program). The Elkhart, Indiana, Victim-Offender Reconciliation Program refers only one or two cases each year back to the court for failure of parties to follow through on restitution agreements. *Id.* In addition, some degree of conciliation takes place in three-fourths of the cases. *Id.* The program has successfully handled juvenile and adult offenders. *Id.* at 239. Most cases have involved nonviolent property crimes, but the program also has resolved assault and battery cases successfully. *Id.*

296. *See* Bethel & Singer, *supra* note 169, at 29 (stating that participants in domestic violence mediation report high degree of satisfaction with outcome); J. FOLBERG & A. TAYLOR, *supra* note 114, at 11-12 (discussing participants' satisfaction with mediation in various types of disputes). Divorce and custody mediation users report a high degree of satisfaction with the fairness of agreements. *Id.* Users of special education mediation and neighborhood justice centers also report satisfaction. *Id.* at 13. The growth of mediation programs apparently indicates user acceptance. *Id.*

297. *See* Rifkin, *supra* note 121, at 31 (discussing change in dominance and power in parties' relationship resulting from divorce and sexual harassment mediation).

298. *See* J. FOLBERG & A. TAYLOR, *supra* note 114, at 12 (discussing satisfaction of mediation participants with mediation process as compared to court system).

299. *See id.* at 24 (discussing mutual gain aspect of mediation).

300. *See id.* (discussing satisfaction of participants with mediation process as compared to court system).

301. *See supra* notes 42-44 and accompanying text (discussing rape victim's need to regain control of life as soon as possible after rape).

302. *See* Wright, *supra* note 23, at 639 (discussing importance of not pressuring crime victim to participate in mediation).

303. *See* Umbreit, *supra* note 188, at 204 (discussing victims' willingness to mediate); Wright, *supra* note 23, at 639 (discussing victims' willingness to mediate).

304. *See* Wright, *supra* note 23, at 639 (discussing healing of crime victim).

of mediation is to assist the victim in recovering from the crime.[305] Although mediation can assist only partially in aiding a rape victim, its use highlights her importance as the injured party, which the criminal justice system fails to do.[306]

Rape is a frequent and serious occurrence in our society.[307] Most rapes are simple rapes in which the victim and offender were acquainted prior to the rape and in which physical violence was absent.[308] Simple rape causes serious emotional trauma for a victim, resulting in a need to regain self-esteem and control over her life.[309] Shortcomings within the criminal justice system, however, discourage many victims of simple rape from reporting the rape.[310] Even if a victim reports a simple rape, bias against victims of simple rape dramatically reduces the likelihood of a serious police investigation, trial, and conviction.[311] When the criminal justice system does deal with a simple rape case, the system fails to allow the parties control over their dispute.[312] In addition, the criminal justice system deals ineffectively with underlying causes for the rape, and thus, fails to educate the parties or reform the offender.[313] Mediation, a process in which the victim and offender meet with the aid of a neutral third party, avoids the bias of the criminal justice system against the rape victim.[314] Mediation provides a victim with assistance in overcoming the feelings of powerlessness that resulted from the rape.[315] Mediation also allows the victim and offender to confront each other and to deal with any miscommunication or misinterpretation of behavior that led to the rape.[316] Ultimately, mediation allows an offender to face up to what he has done, while avoiding the stigma of

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305. *See* Wright, *supra* note 23, at 639 (discussing purpose of mediation as partially to help crime victim recover emotionally from aftereffects of crime); Umbreit, *supra* note 188, at 204 (stating that victims must never be forced to mediate).

306. *See* Williams, *Reparation and Mediation in the Criminal Justice System—II*, 136 NEW L.J. 1141, 1141-42 (1986) (discussing mediation as aid to crime victims).

307. *See supra* notes 1-13 and accompanying text (discussing incidence of rape in United States).

308. *See supra* notes 3-6 and accompanying text (defining "simple rape"); *supra* notes 9-13 and accompanying text (discussing incidence of simple rape).

309. *See supra* notes 30-44 and accompanying text (discussing emotional trauma victim endures as result of simple rape).

310. *See supra* notes 45-91 and accompanying text (discussing factors that discourage reporting of rape).

311. *See supra* notes 55-91 and accompanying text (discussing bias against rape victims within criminal justice system).

312. *See supra* notes 114-21 and accompanying text (explaining how criminal justice system fails to allow parties control over resolution of dispute).

313. *See supra* notes 129-46 and accompanying text (discussing failure of criminal justice system to deal with underlying causes of simple rape, to educate parties, or to reform offender).

314. *See supra* notes 224-32 and accompanying text (explaining how mediation avoids bias of criminal justice system against victim of simple rape).

315. *See supra* notes 207-17 and accompanying text (explaining how mediation assists victim of simple rape in overcoming feelings of powerlessness that resulted from rape).

316. *See supra* notes 233-43 and accompanying text (explaining how mediation deals with underlying causes of simple rape and teaches parties new ways of interacting).

a rape prosecution.[317] Mediation, therefore, represents a more effective and more healing solution than the court system to the problem of simple rape in our society.[318] In addition, mediation holds the hope of changing societal causes of rape faster than the criminal justice system by changing individuals one by one.[319]

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317. *See supra* notes 218-23 and accompanying text (discussing mediation as ideal forum for offender to apologize to rape victim); *supra* notes 253-61 and accompanying text (explaining how mediation can help reform simple rapist); *supra* notes 268-73 and accompanying text (discussing motivation for offender to participate in mediation of simple rape case).

318. *See supra* notes 169-306 and accompanying text (discussing mediation as more healing and effective solution than criminal justice system for simple rape cases).

319. *See supra* notes 262-67 and accompanying text (explaining mediation's potential for changing societal causes of simple rape faster than criminal justice system).