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Matthew J. Sauter

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COMMENT

POST-CONVICTION MEDIATION OF RAPE CASES: WORKING WITHIN THE CRIMINAL JUSTICE SYSTEM TO ACHIEVE WELL-ROUNDED JUSTICE

I. INTRODUCTION

Ken and Barbie have been dating for the past couple of weeks. On this particular evening, Barbie is at Ken's apartment watching a movie. After the movie is over, Ken and Barbie begin to get a little intimate. A little soon progresses into a lot, and Ken and Barbie find themselves having removed each other's clothes down to their respective undergarments. At this point Ken begins to remove Barbie's underwear. Barbie grabs Ken's hand and says simply, "No." A few minutes later, Ken once again attempts to remove Barbie's underwear; this time she does not protest. The underwear comes off, and the two engage in sexual intercourse. Question: Has Ken raped Barbie?

Some may answer yes: Once a woman has expressed her desire not to have sexual intercourse, she cannot minutes later be said to have engaged in consensual sexual intercourse. Others would answer no: Although at one point in the evening Barbie told Ken she did not want her underwear removed, as things "heated up" she changed her mind and decided that sexual intercourse was what both she and Ken wanted. Ken and Barbie themselves may even be confused as to the answer to the above question.¹

1. One of the most difficult problems with rape "comes in understanding and defining the threshold for liability — where we draw the line between criminal sex and seduction." Susan R. Estrich, *Rape*, 95 YALE L.J. 1087, 1180 (1986). "[T]he law of rape must confront the powerful norms of male aggressiveness and female passivity which continue to be adhered to by many men and women in our society." *Id.*

"The law did not invent the "no means yes" philosophy. Women as well as men have viewed male aggressiveness as desirable and forced sex as an expression of love; women as well as men have been taught and have come to believe that when a woman 'encourages' a man, he is entitled to sexual satisfaction." *Id.*

The word "rape" evokes a range of images, emotions, and concepts.² People disagree strongly about what rape is, why rape occurs, and even what evidence should be admitted or required to prove that rape occurred.³ Furthermore, most people are uncomfortable when rape is mentioned or discussed.⁴

These problems that people have with defining or even discussing rape makes it difficult to design and implement a more effective system for rape prevention. In order to improve the manner in which the criminal justice system deals with rape, we must first address the attitudes that men and women in our society have about dating and sexual intercourse.

"Many young women today believe that sexual pressure, including physical pressure, is simply not aberrant or illegal behavior in a dating situation."⁵ "Contemporary teenagers expect and receive a fair amount of pressure for sex in dating situations."⁶ "This expectation may lead many young women to accept as normative sexually aggressive, or even assaultive, behavior unless it occurs

2. Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 398 (1985).

3. See, e.g., David S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976); Frederick Eisenbud, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403 (1975); Edwina G. Johnson, Note, 27 BAYLOR L. REV. 362 (1975).

4. As one author has observed, people have "trouble with rape" because:

[T]he mention of rape makes us all uneasy — for different reasons depending on who we are. It makes men uneasiest of all perhaps, and usually brings forth an initial response of nervous laughter or guffawing jokes. After all, as far as the normal, but uninformed man knows, rape is something he might suddenly do himself some night if life becomes too dull. It isn't, of course, but he knows too little about it to realize that.

On the other hand, the thoughtful normal man, after hearing the details of a forcible rape, finds it difficult to believe. . . . He knows that all thoughts of sex — which he equates with fun, romance, and mutual admiration — would leave him if the woman were really struggling to get free He does not realize that, to the rapist, the act is not "love," not ardor, and usually not even passion. . . . This gives rise to the commonly held view that: "There is no such thing as rape." . . . To most women, [rape] is almost as unreal as it is to most men because they themselves have not experienced it, and few people who have done so are in the habit of talking about it. . . .

At the same time, an occasional newspaper story about a particularly brutal rape-murder makes all women shudder. They wonder if it could possibly happen to them, and if it did, how would they react. . . .

One way of coping . . . is to imagine, and then believe, that women to whom rape happens are in some way vastly different from oneself. Deciding that they must have been taller, shorter, fatter, thinner, older, or younger will not work since rape victims come in all variations of these attributes. It is far easier to settle on some-impalpable quality which is not so easily measured with a ruler or scale. This accounts for the overwhelming number of women who believe that most claims of being raped are either outright lies, or that the rapes were brought on by the victim herself.

CAROLYN J. HURSCHE, *THE TROUBLE WITH RAPE* 5-7 (1977).

5. Estrich, *supra* note 1, at 1166.

6. *Id.*

outside a dating situation or becomes especially violent."⁷ In the same vein, many young men feel that it is their role in a relationship to be the sexual aggressor.⁸ The aggressive attitudes that men have toward sex, dating, and rape are cultivated attitudes which are prevalent in our society.⁹

As long as these attitudes about relationships and sex continue to persist, police, prosecutors, judges, jurors, and legislators will continue to support a criminal justice system which is feared by rape victims and exploited by rapists.¹⁰ It is hopeful that as attitudes accelerate toward reality, many of the prevalent myths concerning rape will slowly vanish and our criminal justice system will become better equipped to handle cases of rape in a way that corresponds with reality.¹¹

It is important to note here that the above goals will realistically neither be achieved overnight nor will they ever be accomplished to 100 percent satisfaction. The sexual attitudes which persist today are deeply rooted in our society, and it will take many years of education and remodeling in order to turn 180 degrees.¹²

Additionally, our criminal justice system is geared toward protecting the rights of the alleged offender, not the victim.¹³ Every person charged with a crime is presumed innocent until proven guilty beyond a reasonable doubt. Those working toward reforming the way the courts handle charges of rape must realize

7. *Id.* at 1167. A survey at Washington State University reported that five percent of the women and 19 percent of the male students do not even believe that forcible rape on dates is definitely criminal rape or that male's behavior is definitely unacceptable. *See id.* n.274.

8. Marcia G. Pfeifer, Note, *Date Rape: The Reality*, 17 S.U. L. REV. 283, 292 (1990).

9. *Id.*

10. *See* Estrich, *supra* note 1, at 1163. "The final report of the Battelle Memorial Institute of its multi-year project on forcible rape, published in 1978, . . . concluded that 'victimization studies have shown that rape is probably the most under-reported of all major crimes. If victimization estimates are accurate, the actual number of rapes in the United States is approximately four times the reported number.'" *Id.* (quoting NATIONAL INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE 15 (1978)).

11. Some myths regarding acquaintance rape are:

1. Rape is committed by crazed strangers.
2. A woman who gets raped deserves it, especially if she agreed to go to the man's house or ride in his car.
3. Women who don't fight back haven't been raped.
4. If there's no gun or knife, you haven't been raped.
5. It's not really rape if the victim isn't a virgin.
6. If a woman lets a man buy her dinner or pay for a movie or drinks she owes him sex.
7. Agreeing to kiss or neck or pet with a man means that a woman has agreed to have intercourse with him.
8. Once a man gets turned on, he can't help himself from forcing sex on a women.
9. Women lie about being raped, especially when they accuse men they date or other acquaintances.

Pfeifer, *supra* note 8, at 292 n.30.

12. Estrich, *supra* note 1, at 1180-82.

13. *See* Dorothy G. Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1188-94 (1990).

that in every crime, not just rape, guilty people will go free.¹⁴ But this does not mean that our present system cannot be vastly improved and slowly move much closer to the point where every rapist is put behind bars.

This Comment will focus on the steps that can be taken within our criminal justice system to help change the attitudes of police, prosecutors, judges, jurors, and legislators toward the crime of rape. It will particularly focus on how mediation can be used concurrently with the criminal courts system in order to achieve justice for all parties involved, victims as well as offenders.

II. THE CURRENT CRIMINAL JUSTICE SYSTEM

In the late eighteenth and early nineteenth centuries, the judges of England waged a successful campaign against dueling. While the "attitude of the law" was clear that killing in a duel was murder, the problem was that for some, accepting a challenge remained a matter of "honour," and juries would therefore not convict. Some change in the public attitude toward dueling, coupled with energy of judges in directing juries in strong terms, eventually brought about convictions, and it was not necessary to hang many gentlemen of quality before the understanding became general that dueling was not required by the code of honour.¹⁵

In much the same way that judges and juries changed their attitudes toward dueling in the Nineteenth Century, our Twentieth Century judges and juries need to reform their attitudes toward the way men and women should be pursuing sexual relations in our modern-day society. The law should act as a barometer of our societal values; accordingly, legislators and judges need to reshape the law concerning the act of rape in order to bring the law closer to how modern-day men and women view consensual sexual relations. If it is made clear that non-consensual sexual intercourse will not be tolerated, then it will become unnecessary to prosecute too many "gentlemen of quality" before the understanding becomes general that "manly honor need not be inconsistent with female autonomy."¹⁶

As our present system exists, rape is probably the easiest crime to allege — and the hardest to prove.¹⁷ Before fully understanding the above assertion, the two types of rape scenarios must be distinguished. If limited to incidences of violent stranger rape, our system for the most part is swift and efficient in achieving justice.¹⁸ But when we focus on so-called non-traditional rape, those

14. *See id.*

15. Estrich, *supra* note 1, at 1181.

16. *Id.*

17. Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 304 (1974).

18. Estrich, *supra* note 1, at 1161-62.

incidences involving non-strangers, less force, no beatings, and no weapons, the ability of prosecutors to achieve convictions is greatly diminished.¹⁹

The reason the above is true is because the framework of the present criminal process only finds certain kinds of cases desirable for prosecution.²⁰ "Studies of individual jurisdictions, along with surveys of prosecutors, point to three sets of crime-related factors which determine whether a rape arrest will lead to prosecution and conviction."²¹ These factors are as follows: (1) the relationship of victim and offender; (2) the amount of force and resistance; and (3) the existence of corroborating evidence.²² If we examine the above factors in the context of non-stranger rape cases, we can readily see why these types of cases are currently not leading to prosecution and conviction.

In the non-stranger scenario, the victim and the offender have already established a relationship before the incident occurs. In many cases, the victim and the offender may have even engaged in some sort of sexual intimacy previous to the rape incident.²³ Because of this prior relationship, juries often find it difficult to believe that any intercourse between the parties was non-consensual.²⁴

In cases of non-stranger rape, the amount of force used to overpower the victim is usually not as great as it would be in stranger rape.²⁵ "The force used to overcome a woman's resistance in non-stranger rape often is a psychological one."²⁶ Without physical evidence such as bruises or cuts which would indicate the use of force, juries once again have a hard time believing that the intercourse was not consensual.²⁷

Finally, in cases of non-stranger rape, the existence of corroborating evidence is, on average, less than it would be in other crimes such as assault, burglary, and murder.²⁸ This is true mainly because the victim, having already been acquainted with the offender, will normally not be fearful of being alone with the offender. Thus, in many cases of non-stranger rape, the victim and the offender are the only parties with knowledge of the incident.²⁹ The determination of guilt in these cases invariably revolves around the issue of who

19. See generally Pfeifer, *supra* note 8, at 285-90.

20. *Id.* at 290. A "good case" would include a victim whose reputation was unblemished; the production of physical evidence to indicate that a struggle occurred; a doctor's report showing that the victim had been raped; an eyewitness who corroborated the victim's story; and a description of the offender provided by both the eyewitness and the victim. *Id.*

One can readily see from just a cursory examination that the above factors will not normally exist in the situation where the offender and the victim are mere acquaintances.

21. Estrich, *supra* note 1, at 1171.

22. *Id.*

23. See *id.* at 1176.

24. *Id.* at 1177-79.

25. Pfeifer, *supra* note 8, at 289.

26. *Id.*

27. *Id.* at 290-93.

28. Estrich, *supra* note 1, at 1175.

29. See *id.*

appears to be the more credible witness, victim or defendant.³⁰ Often inherent biases held by judges and juries toward the victim in non-stranger rape cases works against the victim being found the more credible witness.³¹

The importance of the above factors (prior relationship, force, and corroboration) appears rather typical of the way the criminal justice system generally processes cases.³² But treating rape the same as other crimes such as burglary, assault, and murder is only proper if the facts revolving around these types of crimes are the same;³³ the type of evidence in a non-stranger rape case is not parallel with that which exists in other crimes. Thus, it seems inappropriate to use the same process for rape that we do for other crimes.

III. REFORMING THE CRIMINAL JUSTICE SYSTEM

Recently, legislators as well as judges have embarked on an effort to reform attitudes toward rape. Some of these efforts concern changing the existing law as well as creating new law to address the problems which exist in getting a rape conviction.³⁴ Other efforts concentrate on the rights of victims, such as developing programs which attempt to help rape victims feel whole again.³⁵ These efforts all have a common goal of eliminating legal rules and public opinions that are premised on a stereotype of women as vengeful liars or fantasizing cheats.³⁶ They are all "part of a larger effort to change the way the law and our society think about women, sex, and sexuality."³⁷

In the following paragraphs, I will examine some of the particular efforts discussed generally above. It is important to note here that the following is not a complete reformation of the manner in which our criminal justice system handles the crime of rape. Whether and how much difference the present level of reform has made on the system's operation is far from clear.³⁸ I am simply holding the following out as a step in the right direction toward working within the present system to reform the way our criminal justice system handles rape cases.

30. Pfeifer, *supra* note 8, at 291.

31. *Id.*

32. Estrich, *supra* note 1, at 1174.

33. *Id.*

34. *See infra* notes 40-68 and accompanying text.

35. *See infra* notes 119-47 and accompanying text.

36. Estrich, *supra* note 1, at 1157.

37. *Id.*

38. *Id.* Many of the goals of rape law reform cannot be easily measured by statistical studies. *See id.*

A. Rape Shield Laws

A tactic often used previously by defense attorneys in rape cases was to elicit evidence from the victim concerning her prior sexual history.³⁹ The defense attempted to portray the victim as a person with low morals and thus to imply to the jury that the victim either consented to the sexual intercourse or was "asking to be raped."⁴⁰ As a result of these tactics, many rape victims were forced to undergo a form of trauma on the witness stand which was, in some cases, worse than the actual rape experience itself.⁴¹

In response to this defense tactic, legislators throughout the country have enacted "rape shield statutes" that disallow evidence of a victim's prior sexual history to be introduced except in very limited circumstances.⁴² Such statutes

39. See Massaro, *supra* note 2, at 422.

40. *Id.* Although it may seem hard for some readers to believe that any woman "asks to be raped," it is well-documented that juries in the past have acquitted rape defendants because the victim by her actions, her dress, or even her willingness to be alone with the defendant was seen as allowing herself to be raped; in other words, that the victim was somehow at fault, and, thus, this excused the defendant's behavior. See *id.* & n.117.

41. Bohmer, *supra* note 17, at 303.

42. See FED. R. EVID. 412. The rape shield statute, enacted by a majority of states, prevents defense attorneys from asking the alleged victim about her sexual history on the stand, unless they have satisfied procedural requirements that ensure that the evidence is relevant. It provides:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) . . . [E]vidence of a victim's past sexual behavior other than reputation or opinion evidence is . . . not admissible, unless such evidence other than reputation or opinion evidence is —

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of —

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer . . . evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines earlier that such evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. . . .

are designed to steer the jury's attention away from the prior sexual conduct of the victim and thus allow the jury to focus on the most important issue, resolving the facts surrounding the rape charge. Juries should not be allowed to acquit an accused based on what they perceive to be a situation where the victim was at fault because of her prior sexual history. Simply because a victim said "yes" on previous occasions does not mean that she did the same in the instant case.

Rape shield statutes relieve part of the problem in criminal prosecutions of rape.⁴³ Interviews with prosecutors, defense attorneys, and judges indicate that rape shield statutes are helping to decline the importance attached to the victim's prior sexual history.⁴⁴

B. Rape Trauma Syndrome

In many cases of acquaintance rape, the force used to overcome a woman's resistance is a psychological one.⁴⁵ Because of this there is very little physical evidence such as cuts and bruises which would indicate to the jury that the intercourse was non-consensual.⁴⁶ Often the only evidence from which the jury must make a decision is the testimony of the victim and the accused.⁴⁷ It is understandably hard for a jury to convict an accused "beyond a reasonable doubt" when the case turns on the comparative credibility of the witnesses.

In cases such as the above, an increasing number of jurisdictions now allow the expert testimony of a psychiatrist regarding the existence of rape trauma syndrome.⁴⁸ Rape trauma syndrome is a term psychiatrists use to characterize the feelings of powerlessness, anger, and betrayal which all victims experience

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if any such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. . . .

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

Id.

43. Pfeifer, *supra* note 8, at 287.

44. Estrich, *supra* note 1, at 1160. A caveat to this assertion must be inserted here. Although it is true that rape shield statutes are to a large extent working, defense attorneys continue to investigate the victim's sexual history as a matter of course and seek ways to use such information to discredit the victim. *Id.* The important point here is that the statutes have made it much more difficult for defense attorneys to get the victim's sexual history into evidence and before the jury.

45. Pfeifer, *supra* note 8, at 289.

46. *See id.* at 288-89.

47. *Id.* at 291.

48. *Id.* at 289 n.23.

following the rape.⁴⁹ The syndrome begins with a brief period of acute emotional disorganization for the victim.⁵⁰ During this period, the rape victim may suffer extreme fear, shock, anger, and anxiety which she may either mask or express outwardly.⁵¹ During the second phase of rape trauma syndrome, the victim begins to reorganize and regain control of her life.⁵² All victims are left with some paranoia,⁵³ and most victims have a fear of sexual contact after the rape.⁵⁴ A psychiatrist trained in this area can diagnose rape trauma syndrome from these symptoms.⁵⁵ It is clearly distinguishable from the guilt caused by an immoral act or fear of an unwanted pregnancy.⁵⁶

Courts allowing testimony that a victim is experiencing rape trauma syndrome result in juries hearing more evidence from which they can convict in cases of acquaintance rape.⁵⁷ This is especially helpful in cases where the jury was only previously left with the testimony and comparative credibility of the victim and the accused from which to reach a decision.⁵⁸

C. Acquaintance Rape Statutes

In cases of acquaintance rape, it is often difficult to get a conviction under the current rape statutes.⁵⁹ Some commentators believe that this has something to do with the psychological profile of rapists; a large percentage of rapists do not look or act like criminals.⁶⁰ This profile is one of a basically average person except that a rapist is more aggressive, impulsive, and violent.⁶¹ Because many rapists appear on the surface to be normal, and thus do not conform to many jurors' expectations, the severity of punishment required by many current rape statutes may actually work in favor of the defendant.⁶² For example, if jurors think of a stereotypic rapist as being a psychopathic degenerate, then when confronted with an individual who does not match their preconceptions, members of the jury may acquit the defendant because they perceive the mandatory penalty as too severe for the individual.⁶³

49. Goolsby, *supra* note 13, at 1186.

50. *Id.*

51. *Id.*

52. *Id.* at 1186-87.

53. Pfeifer, *supra* note 8, at 289 n.23.

54. *Id.*

55. *Id.*

56. *See* State v. McQuillen, 689 P.2d 822, 831 (Kan. 1984) (Herd, J., concurring).

57. *See id.* at 832-33 (Schroeder, C.J. dissenting).

58. *See supra* notes 29-31 and accompanying text.

59. Pfeifer, *supra* note 8, at 293 n.33.

60. *See, e.g.*, HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY OF PSYCHOLOGICAL LAW 47 (1980).

61. *Id.* at 56.

62. *Id.*

63. *Id.*

Another reason posed for the dearth of acquaintance rape convictions is because the wording of the current statutes focuses on the amount of physical resistance the victim uses.⁶⁴ If little resistance is shown, then force is difficult to prove.⁶⁵ Unfortunately, in most instances of acquaintance rape, the force used to overcome the victim is psychological rather than physical and, thus, there is very little direct evidence of the victim's resistance.⁶⁶

As a result, it has been suggested that states enact separate statutes that deal with the usual circumstances of an acquaintance rape situation.⁶⁷ It is believed that a statute that lessens the penalty and provides a definition of consent that does not depend upon the compulsion being by physical force would aid prosecutors in getting convictions in acquaintance rape cases.⁶⁸

D. Civil Action

As an alternative to pursuing rape charges in the criminal system, a victim may decide to file a civil case seeking monetary damages from her attacker.⁶⁹ Statistics seem to point out the fact that rape victims are turning to civil suits out of frustration in obtaining convictions in criminal cases.⁷⁰ Because of the lower burden of proof required in a civil case, it is easier for a victim to get a verdict in a civil case than it would be for the state to get a conviction in a criminal case.⁷¹

However, some of the same problems that pervade the criminal justice system exist in the civil context.⁷² In a civil case, a woman can be subject not only to a psychiatric examination but frequent depositions and years of court dates.⁷³ She may also have her sexual past brought up in open court if damages

64. Pfeifer, *supra* note 8, at 293.

65. *Id.*

66. *Id.* at 289.

67. *Id.* at 293. One suggested statute would read as follows:

Date rape is an intentional act committed when anal or vaginal sexual intercourse takes place and the defendant compels another to submit to intercourse by force, gesture, coerced submission, psychological intimidation or by threat of death, injury, pain, or by any other means which would compel a reasonable person under the circumstances to submit. It is not required that the victim resist such force or threat to the utmost, or to resist if resistance would be futile. The victim need resist only to the extent that it is necessary to make the victim's refusal to consent known to the defendant.

Id. at 294.

68. *Id.* n.33.

69. Goolsby, *supra* note 13, at 1191.

70. *See, e.g.*, Jack Epstein, *Legal Aids*, 16 *STUDENT LAW*. 51, 51 (March 1988). In the past five years in California, for example, of 15,373 arrests for rape, only 7,253 yielded convictions in municipal or superior court, according to the state's Bureau of Criminal Statistics. *Id.*

71. *Id.*

72. Goolsby, *supra* note 13, at 1191.

73. *Id.*

are claimed due to a sexual dysfunction caused by the rape.⁷⁴ Thus, the victim may suffer through the same revictimization that often occurs in the criminal rape trial. Additionally, a victim may have insufficient funds to pay a lawyer or the offender may have few financial resources, thus making a monetary recovery unlikely.⁷⁵

IV. MEDIATION AS A MEANS OF REFORMING THE CRIMINAL JUSTICE SYSTEM

The above reforms are presently helping to change attitudes toward the crime of rape and hopefully over time will result in a greater number of rape convictions.⁷⁶ However, notwithstanding these reforms, there is still something missing in the manner in which rape cases are handled by the criminal justice system — an apology.⁷⁷

"Apology is an important ingredient in resolving conflict."⁷⁸ People often extend words of apology when they have in some way intruded upon the rights of another.⁷⁹ An apology is beneficial to both parties.⁸⁰

In the context of rape, a victim often experiences an "intense rage" that has no appropriate outlet.⁸¹ The victim feels a need to regain control of her life.⁸² She needs to understand why the rapist did what he did.⁸³ By receiving an apology and responding to it, a victim is able to confront the rape experience head-on.⁸⁴ She is provided with that outlet which will help in healing the psychological wounds which are preventing her from getting on with her life.⁸⁵

The offender can also benefit from the act of apology.⁸⁶ Often, the offender has feelings of remorse for the act of rape which he has committed.⁸⁷

74. *See id.* at 1190-91 & n.155.

75. *Id.* at 1199.

76. Estrich, *supra* note 1, at 1161. Evidence suggests that the pressures on prosecutors to prosecute rape complaints have mounted substantially in the last decade. *Id.*

77. Ann J. Kellet, Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 J. DISP. RESOL. 111, 126.

78. *Id.* (citing Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986)).

79. *Id.*

80. *Id.* A sincere apology serves three functions. First, it expresses the subjective state of mind of the apologizer — remorse and non-hostility. Second, it indicates an attempt to compensate the injured party. Third, if the apology is accepted and "responded to by at least the beginnings of forgiveness," the injured person's hostility toward the wrongdoer is ameliorated. *Id.* at 126-27.

81. Elizabeth M. Ellis, *A Review of Empirical Rape Research: Victim Reactions and Response to Treatment*, 3 CLINICAL PSYCH. REV. 473, 480 (1983).

82. *Id.*

83. *Id.* at 481.

84. *See Goolsby, supra* note 13, at 1204.

85. *See id.* at 1203.

86. *See id.* at 1202-04.

87. *Id.* at 1204.

He may not understand how the victim feels or the extent of damage he has inflicted.⁸⁸ By expressing his sorrow toward the victim and experiencing her response, the offender may be able to gain insight into the negative impact he has had on someone's life.⁸⁹ The face-to-face encounter with the victim may be seen by some offenders as more punishing than actually to serve jail time.⁹⁰ This may aid in reforming an offender more satisfactorily than the criminal justice system.⁹¹

Although apology is a common occurrence in everyday life, it has unfortunately not been incorporated into American legal doctrines.⁹² The American criminal justice system is based on resolving innocence or guilt while at the same time providing for the utmost protection of the constitutional rights of the individual defendant.⁹³ Nowhere in our constitution is there a provision for ensuring the rights of victims of crimes.⁹⁴ Furthermore, the criminal justice system has no means by which an offender and victim will be allowed a face-to-face encounter in which to express apology.⁹⁵ In fact, the adversarial process is more likely to skew power than to equalize it, to accentuate hostility rather than trust, and to facilitate competitiveness and aggression rather than empathy and understanding.⁹⁶

This is precisely where the process of mediation can aid the reformation of the criminal justice system. Mediation can provide a forum where offenders can express apology and victims are allowed to respond. Mediation can work alongside with the criminal courts in proving an essential building block in the reformation process — a face-to-face encounter which can be beneficial to both victims and offenders.

A. *The Mediation Process*

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 their differences.⁹⁷ The mediator "works with [the parties] together and separately to identify important issues, to minimize the retrospective placing of blame, to stress potential areas of agreement, and to build the desire to reach

88. *See id.* at 1202.

89. *See id.*

90. Clifford Williams, *Reparation and Mediation in the Criminal Justice System*, 136 NEW L.J. 1106, 1106 (1986).

91. *Id.* at 1107 (discussing mediation as type of rehabilitation for offenders).

92. Kellet, *supra* note 77, at 126.

93. *See* Goolsby, *supra* note 13, at 1186.

94. *See id.*

95. *See id.* at 1203-05.

96. David P. Mesaros, *The Oklahoma Department of Corrections: Assisting Crime Victims through Post-conviction Mediation*, 1 OHIO ST. J. DISP. RESOL. 331, 331 (1986).

97. Goolsby, *supra* note 13, at 1200.

a settlement acceptable to both parties.⁹⁸ Mediation has been used extensively in recent years in resolving interpersonal disputes.⁹⁹

Mediation is a broad term used to describe any scenario where a neutral third-party with no formal coercive power aids disputants in reaching a voluntary agreement.¹⁰⁰ Mediation programs vary according to the type of dispute being addressed, the relationship of the individual parties involved, the skills of the mediator, and the management needs of the program itself.¹⁰¹ However most mediation programs share the following basic features.

First, mediation is not therapy.¹⁰² The goal of mediation is to effect behavioral change.¹⁰³ In the case of rape, the goal would be to help correct the behavior of offenders by showing them the hurt which they have inflicted on the victim. Once the offender sees first-hand the damage he has done, perhaps he will feel remorse and begin to reform his behavior.

Second, mediation provides an informal atmosphere where parties can resolve their conflicts.¹⁰⁴ The mediator simply brings the parties together; she has no higher authority to make findings of fact or decisions about blameworthiness.¹⁰⁵ However, the mediator does insist upon certain ground rules, first among them that the parties listen to each other without interruption.¹⁰⁶

Third, the nature of the parties' participation is controlled by the mediator.¹⁰⁷ Normally, the mediator will meet with the individual parties separately in order to get each side of the story.¹⁰⁸ If the parties are having difficulty communicating, which is likely in a case of rape, the mediator oftentimes will work with the parties extensively in joint sessions with the hope of promoting useful communication between the parties.¹⁰⁹ However, in most programs the mediator does most of his or her work in individual sessions with the parties.¹¹⁰ A common misconception of mediation is that the process is a three-way discussion between the mediator and the two disputants.¹¹¹ Although it is true that mediation involves joint sessions with the parties, much of the work

98. Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 15 (1982).

99. *Id.*

100. *Id.* at 17.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 18.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 19.

is done in individual sessions where the mediator tries to facilitate eventual communication between the parties.¹¹²

Fourth, mediation is largely a voluntary process but that does not necessarily mean both parties must be 100 percent willing to go through the mediation process in order for success.¹¹³ Some elements of coercion, such as the prospect of further police action or the possibility of a reduction in sentence, may be necessary in order to bring the parties together.¹¹⁴ To say that there are strong pressures to cooperate is not to say that there is no voluntariness.¹¹⁵ Although there may be some point where the pressure to participate in mediation is so overwhelming that the process will not be effective, some amount of coercion will not generally destroy the effectiveness of mediation.

Fifth, mediation relies on an approximate equality of bargaining power between the parties.¹¹⁶ If one side dominates the other, there is less likelihood that the agreement reached between the parties will be the result of cooperative participation rather than fear of retribution.¹¹⁷ The notion that mediation is only 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.¹¹⁸

B. Mediation in Cases of Rape

Once one accepts the general idea that mediation in rape situations can be a beneficial experience for both the victim and the offender the discussion then focuses on the mechanics of a rape mediation program. Some of the questions relevant to this discussion are as follows:

- (1) At what point should the victim and the offender engage in mediation?
- (2) Should the program be used pre-trial as a means of possibly avoiding the entire criminal process?
- (3) Would mediation be better situated as a post-trial remedy after the traditional criminal process has turned its wheels?
- (4) What types of rape cases are suited for the mediation program?
- (5) Should certain characteristics of the victim, the offender, and the actual rape be taken into consideration before deciding to submit a case to mediation?

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 244 (1988).

The above questions basically boil down to two central issues. The first issue is what types of cases are best fitted into the mediation framework. The second issue is the timing of the actual mediation: At what point in the criminal process should the victim and offender get together in the mediation setting.

1. *What To Mediate*

Not every rape case is appropriate for mediation. In fact it may only be in a relatively small number of cases where a victim-offender reconciliation meeting will be deemed appropriate.¹¹⁹ In deciding whether to mediate a rape case, two important factors must be considered. First, both the victim and the offender must be willing to participate in the mediation sessions.¹²⁰ Mediation will not work if either the victim or the offender is overly coerced into engaging in the program.¹²¹ This is not to say that putting a slight amount of pressure on the offender to participate will be detrimental.¹²² To say that there may be strong pressures to cooperate is not to say that there is no voluntariness.¹²³ We all make choices that are not entirely independent but that we are free to reject.¹²⁴ Second, the offender must be a suitable candidate for mediation. Offenders with lengthy arrest records suggesting a sociopathic character will not make good candidates for mediation.¹²⁵ Mediation will not work if the offender's character is such that he is incapable of feeling any remorse for the terrible damage he has inflicted on someone's life.

2. *When to Mediate*

A review of the criminal process will lead observers to the conclusion that there are two points in time during the processing of a rape charge where it would be possible to implement mediation strategy. Either the mediation would be conducted pre-trial as a means of possibly circumventing the criminal courts or the mediation would be post-trial and used as a tool to work alongside the traditional criminal process. Post-trial mediation of rape cases would fill in the gaps where the criminal justice system does not presently provide for the needs of both rape victims and offenders.¹²⁶

119. Mark Umbreit, *Victim Offender Mediation and Judicial Leadership*, 69 JUDICATURE 202, 204 (1986).

120. *Id.*

121. *Id.*

122. Bethel & Singer, *supra* note 98, at 19.

123. *Id.*

124. *Id.*

125. Umbreit, *supra* note 119, at 204.

126. *See supra* notes 76-96 and accompanying text.

As mentioned earlier, the present criminal system does not adequately prosecute instances of so called non-traditional rape.¹²⁷ The myriad of proof problems which exist with these types of cases makes many prosecutors wary of even pursuing a criminal conviction in instances of non-traditional rape complaints.¹²⁸ It has been suggested that mediation could be implemented in these types of cases as a means of avoiding the criminal process in total.¹²⁹ The idea is that alleged offenders would be given the choice of either the victim's complaint being investigated for possible prosecution or submitting to a mediation session with the rape victim and having the matter dropped by the prosecutor's office.¹³⁰ I believe that this type of mediation would be an undesirable method of dealing with rape complaints.

First, there is the problem of getting the alleged offender to participate in the mediation. In many instances of non-traditional rape, the alleged offender does not believe that a rape has even occurred.¹³¹ He views the intercourse as being entirely consensual. It is ludicrous to suggest in these situations that an alleged offender is going to submit to mediation. Furthermore any pressure that the prosecutor's office would put on the alleged offender would be fruitless. The threat of criminal prosecution in cases of non-traditional rape will not strike one bit of fear in offenders because it is well-known that these type of cases are never brought to trial.¹³²

Second, even if the alleged offenders would agree to participate in pre-trial mediation there still remains the problem of a power disparity between the victim and the alleged offender which would make mediation ineffectual.¹³³ The alleged offender will still believe in many instances that no rape has occurred.¹³⁴ Without the question of whether or not a rape occurred being resolved, there is a danger that mediation would result in the victim being revictimized by an alleged offender who denies any wrongdoing.¹³⁵

Third, advocating the circumvention of the criminal process through mediation of rape complaints is a position which supports giving up on the criminal justice system. Admittedly there are problems with the present system

127. See *supra* note 20.

128. Pfeifer, *supra* note 8, at 290.

129. See generally Goolsby, *supra* note 13.

130. *Id.*

131. Estrich, *supra* note 1, at 1164-66. Even many women do not believe that a rape has occurred in the non-traditional scenarios. A recent study found that in situations where a woman is presented as being forced to engage in sex after a "date with a respected bachelor" or with a man she met in a bar who takes her to a deserted road (instead of home) or with her boss after working late, less than half of the female respondents were certain that a rape had occurred. *Id.* at 1165.

132. *Id.* at 1162. Additionally a mediation program should not mislead any participant by suggesting, even subtly, that sanctions will be applied upon a refusal to mediate if this is in fact not the case. Bethel & Singer, *supra* note 98, at 32.

133. Bethel & Singer, *supra* note 98, at 19.

134. Estrich, *supra* note 1, at 1164-65.

135. Goolsby, *supra* note 13, at 1184-85.

of prosecuting rape complaints;¹³⁶ however, simply because the system is broken does not mean we should throw it away. The better approach would be to work within the present system and to make the necessary repairs which will help generate more rape convictions in the future.

Finally, evidence tells us that non-traditional rape complaints are not well-received by prosecutors.¹³⁷ Prosecutors know how difficult it is to get a conviction in these types of cases, and therefore many prosecutors would just as soon steer clear of acquaintance rape cases.¹³⁸ By creating a system of pre-trial mediation for rape cases, we would be giving the prosecutors an avenue to dispose of unwanted cases.¹³⁹ This is not the proper message to be sent to prosecutors' offices throughout this country. Instead, the message should proclaim that, with changes in rape law and changes in people's attitudes toward the crime of rape, there will eventually come a time when it will be possible to obtain more convictions in non-traditional rape cases.

No matter how close the criminal justice system comes to bringing rape laws and rape attitudes closer to reality, there will still remain one glaring problem — the legal process will still be unable to give proper attention to the needs of the victim.¹⁴⁰ This is precisely where a program of post-conviction mediation would be beneficial. Mediation could work within the legal system as a vehicle for promoting the needs of both victims and offenders.

The victim of rape experiences a multitude of emotions, such as disbelief, self-recrimination, paranoia, and rage.¹⁴¹ These negative emotions are not isolated to the rape event itself.¹⁴² Experts identify a "second injury" to the victim which results from bringing a rape case through the court system.¹⁴³ Throughout the processing of a rape case, the court system shows little concern for the victim's efforts to adjust to the alleged rape or for aiding the victim in confronting the attitudes she encounters in interacting with the criminal justice system.¹⁴⁴ Victims frequently report that their encounters with the police, district attorneys, and courtroom personnel were more traumatic than the rape incident itself.¹⁴⁵ By participating in a post-conviction mediation program, the victim will be able to confront and to sort out the emotions experienced by both the rape itself and the rape trial.

136. *See supra* notes 15-33 and accompanying text.

137. *Estrich, supra* note 1, at 1162.

138. *Id.*

139. Interview with Deborah Doxsee, Assistant Director of the Center for the Study of Dispute Resolution and Director of Community Mediation Services, University of Missouri School of Law, in Columbia, Mo. (Nov. 20, 1991)[hereinafter Doxsee Interview].

140. *See Mesaros, supra* note 96, at 340.

141. *Id.* at 333.

142. *Id.*

143. *Id.*

144. Bohmer, *supra* note 17, at 303.

145. *Id.*

Additionally, a post-conviction mediation program avoids many of the pitfalls which make pre-trial mediation of rape cases undesirable. Having resolved the question of guilt through a criminal conviction, the power disparity that existed between the victim and offender will be virtually diminished.¹⁴⁶ The offender will also be more willing to cooperate at this stage of the process, especially if the prospect of a reduction in sentence seems likely.¹⁴⁷ Finally, choosing post-conviction rather than pre-trial mediation sends a message to the criminal justice system that the present criminal process for dealing with rape complaints is not irreparably damaged but that it just needs to be fixed.

V. CONCLUSION

Mediation is often discussed as an alternative to the traditional court process of resolving disputes. However, in the criminal system, mediation versus the courts does not necessarily have to be an either/or proposition. In the criminal context, a program of post-conviction mediation can work alongside the trial process and provide elements of justice which the court system is not designed to achieve. Through mediation, victims of criminal acts will be able to let their offenders know the damage they have inflicted on someone's life. Post-conviction mediation will fulfill some of the victim's needs and thus produce more well-rounded justice.

MATTHEW J. SAUTER

146. See Doxsee Interview, *supra* note 139.

147. Mesaros, *supra* note 96, at 338.