Rape Shield Laws--Is It Time for Reinforcement?

Catherine L. Kello
University of Michigan Law School

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Recommended Citation
Catherine L. Kello, Rape Shield Laws--Is It Time for Reinforcement?, 21 U. MICH. J. L. REFORM 317 (1988). Available at: https://repository.law.umich.edu/mjlr/vol21/iss1/11

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Michigan led the nation when it abandoned its antiquated rape law and enacted a comprehensive criminal sexual conduct statute in 1974. Legislators responded to a growing societal awareness of the unique nature of the crime of rape and the obvious inadequacies of the existing rape law. One of the most innovative ideas in the new statute was a provision that limited inquiry into a rape victim's past sexual conduct. This narrow protection became known as the "Rape Shield Law" and served as a model for rape law reform across the country.

A recently employed defense tactic effectively eliminates the rape shield protection for rape victims. Consider a scenario where a woman reports a rape to her local police department. The prosecutor files criminal sexual conduct charges against the alleged attacker, and a trial is scheduled. The man, prior to the criminal trial, files a civil suit against the rape complainant, alleging defamation, intentional infliction of emotional distress, and abuse of process.

Under Michigan's broad civil discovery rules, the rape complainant becomes subject to immediate deposition, interrogatories, and other discovery devices. In a civil action, the rape

2. Id. at 1028-29 (codified at MICH. COMP. LAWS § 750.520j (1979)).
3. Galvin, Rape: A Decade of Reform, 31 CRIME & DELINQ. 163, 163 (1985). All 50 states now have some type of protection to shield rape complainants from having to disclose publicly their past sexual activities. The majority accomplished this goal through legislation; a few states have relied on judicial opinions or court rules to meet this need. Comment, The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation, 78 J. CRIM. L. & CRIMINOLOGY 644, 644-45 (1987).
4. "Rape victim," as used here, is technically an "alleged rape victim" until the defendant is convicted. The term "rape victim," as it appears in this Note, is meant to be synonymous with "alleged rape victim" when it relates to events prior to an actual criminal conviction. It is also recognized that men and women are the victims of rape. Because women are the victims in the overwhelming majority of rapes, feminine pronouns will be used throughout this Note.
5. Michigan Court Rules allow discovery to begin immediately after the complaint is filed. MICH. CR. R. 2.302(A); MICH. CR. R. 2.101(B).
shield protection regarding a victim's past sexual history does not apply. Therefore, the very matters that the Rape Shield Law protects are exposed, and the intent of the statute is nullified.

The initiation of the civil suit drastically changes the environment surrounding the rape victim. The suit forces her to retain counsel to defend against the civil claims. In the midst of preparing to testify in the criminal proceeding, this woman faces an additional battle. She and her attorney must attempt to postpone the threatened civil discovery until after the criminal proceedings are concluded. She also must consider the implications that a threat of judgment will have on her financial reputation. Furthermore, the prosecutor will insist that the victim keep him informed of developments that might affect the criminal case and may question the veracity of the victim’s claims. The novel rape defense strategy forces rape victims to bear even greater burdens than those facing victims of other violent crimes.

This Note takes a critical look at civil suits arising from allegations of rape, particularly from the perspective of how these actions run counter to the spirit of rape reform and rape shield legislation. The analysis begins with a brief history of the Rape Shield Law and its intended purposes. Part II then utilizes two cases to outline the current dilemma posed by civil suits that are filed during a pending criminal sexual conduct prosecution. After presenting these cases, Part III considers whether a legislative remedy is required and determines that it is. Part IV then proposes a Model Statute. The Note concludes with an analysis of the Model Statute and responds to anticipated criticisms.

I. HISTORY OF THE MICHIGAN RAPE SHIELD LAW

A dedicated group known as the Michigan Women’s Task Force on Rape was primarily responsible for the creation and adoption of Michigan’s Rape Shield Law. The group’s goal was to alleviate the institutional biases a rape victim encountered in the criminal justice system. Their task was formidable. Michigan’s rape law relied on an ancient definition of carnal knowl-

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6. The rape shield law is part of the penal code and therefore only applies to criminal prosecutions. See Mich. Comp. Laws § 750.520j (1979). There is currently no corresponding protection available in civil actions.

edge.\(^8\) The system treated rape as a sex crime, instead of a crime of violence.\(^9\)

At the beginning of the twentieth century, the Michigan Supreme Court required a rape victim to show that the attack was against her will by demonstrating that she did everything she could under the circumstances to prevent defendant from accomplishing his purpose. If she did not do that it is not rape. . . .

. . . [The jury] must find that she was overcome and overpowered, and that resistance must have continued from the inception to the close, because if she yielded at any time it would not be rape.\(^{10}\)

Decades later, the lower courts also remained in the dark, maintaining that "[c]onsent or the failure to use the proper resistance at any time prior to penetration precludes conviction for rape."\(^{11}\) In addition, defense attorneys routinely harassed a rape victim in court by asking questions about her past consensual sexual activity to imply her lack of resistance to the current rape. The rape victim, rather than the accused defendant, was on trial.

A. Legislative Proposal and Support for the Act

The Michigan Women's Task Force on Rape decided that the old carnal knowledge law required novel and sweeping reform. The group gave special attention to the lack of protection or deterrence against rape and the law's effect of discouraging victims from reporting the crime. Of particular concern was the problem of prior consensual sexual activity: "At the judge's discretion, evidence of the victim's prior consensual sexual activity may currently be used to impeach the victim's credibility. As a result,

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few rape victims will testify because they know their private lives will be cross-examined."12

The legislative reform limited this type of inquiry by admitting such evidence only when it was material to the matter at hand, and its prejudicial nature did not outweigh its probative value. It also eliminated the prosecution's burden of corroborating the victim's testimony with independent evidence of penetration, use of force, or identification of the defendant.13 Another important aspect of the reform was that a rape victim no longer had to prove her nonconsent. In its prior form, the law required the victim to "deny any healthy history or interest in sex in order to deny an implication of 'unconscious desire' to be violated."14

After eight months of diligent work by the Michigan Women's Task Force on Rape and others, the bill to reform the rape law was introduced in the Michigan Senate.15 A significant number of groups and organizations publicly supported the bill,16 although the support was far from unanimous. Even those people who urged the legislature to reject the bill supported the adoption of the rape shield protections.17

12. Michigan House Judiciary Comm., Analysis Section, S.B. 1207, at 1 (July 18, 1974) [hereinafter Bill Analysis] (copy on file with U. Mich. J.L. Ref.). The bill also addressed the problems of: (1) equal rights (previous law only applied to female victims); (2) requiring proof that a victim's mind was overcome because of actual or threatened force; (3) confusion in the existing law because of distinctions based solely on penetration; (4) physically or mentally helpless victims; (5) difficulty in proving "nonconsent"; and (6) statutory rape. Id.; see also Task Force Background, supra note 9, at 2-3.

13. Bill Analysis, supra note 12, at 2; S. BROWNMILLER, AGAINST OUR WILL 371-72 (1975). Courts required corroborative proof of rape to "protect" the defendant from the victim's "mere word." This forced the prosecutor to introduce evidence of vaginal tears, bruises, sperm, a weapon, torn clothing, or even an eyewitness to validate the identity of the true rapist. Id.

14. Task Force Background, supra note 9, at 7. One author suggests that a crucial reason for the different treatment of rape by the criminal justice system is that sexual activity is, under the right circumstances, desirable. On the other hand, few people engage in consensual robbery or assault. Williams, Few Convictions in Rape Cases: Empirical Evidence Concerning Some Alternative Explanations, 9 J. CRIM. JUST. 29, 37 (1981). This distinction also explains why rape is traditionally viewed as a sex crime as opposed to a crime of violence.


17. One prosecutor who strongly opposed the bill believed that it was extremely complicated, would hinder law enforcement, and was an invitation for exploitation by defense trial lawyers. This same detractor, however, did support the concept of rape shield protections. Letter from L. Brooks Patterson, Oakland County Prosecutor, to Thomas
What began as a lonely and uphill battle for the Michigan Women's Task Force on Rape now was, for the time being, won when the Michigan Legislature enacted the new Rape Shield Law. These pioneering women successfully marshalled the forces necessary to give rape victims fairer and more humane treatment by the criminal justice system. Based on the Michigan model, every state eventually adopted some type of rape shield protection. In theory, women no longer faced a second brutalization in court; they would not face extensive cross-examination about their personal lives and sexual activities. Ideally, rape victims would be encouraged to report the crime, and society would benefit from the conviction of more rapists who otherwise would be free to rape again.

B. Legal Challenges To Rape Shield

All legal challenges to the Rape Shield Law failed. In one early case, the court would not allow a defense attorney to ask an unmarried rape victim if she knew who fathered her two children. The attorney hoped to discredit the woman's claim that the sexual contact with the defendant was involuntary. The appellate court upheld the trial court's bar of the question, noting that the rape shield law:

represents an explicit legislative decision to eliminate trial practices under former law which had effectually frustrated society's vital interests in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.
On two occasions the rape shield law withstood constitutional challenges. The Michigan Supreme Court held that the Rape Shield Law does not deny or significantly diminish a defendant's sixth amendment right of confrontation.\(^{22}\) This position was later reaffirmed when the court held that exclusion of evidence of a rape complainant's prior sexual conduct does not violate the defendant's right of confrontation.\(^{23}\) Despite these strong words, defense attorneys' desire to inquire into a rape victim's sexual history, previously viewed as "one of defendant's most effective means of attacking [a victim's] veracity,"\(^ {24}\) apparently remained alive.

II. A New Defense Strategy in Rape Cases

In early 1987, a woman filed a police report, stating that she had been raped at a local fraternity house. After a routine investigation, the prosecutor filed criminal sexual conduct charges against a man living in the fraternity house. The man was arraigned and released on bond, and the court scheduled a preliminary examination.\(^ {25}\) The situation appeared to be a conventional rape case. Quickly, however, this case became front page news.

A. Civil Suit

Just two weeks after the preliminary examination, the defendant in the rape case took the unprecedented step of filing a civil lawsuit against the woman who accused him of rape. The suit alleged defamation, intentional infliction of emotional distress, and abuse of process.\(^ {26}\) This action was unusual because it began several months before the scheduled criminal trial date.\(^ {27}\)

\(^{25}\) Man Charged in Rape, Ann Arbor News, Apr. 16, 1987, at A10, col. 3.
\(^{27}\) The court set the original criminal trial date for July 6, less than two months after the preliminary examination. The date was postponed until September 21 at the defendant's request. Id.; Reynolds, Forced Fees Too Much for Client, Attorney Says, Ann Arbor News, July 31, 1987, at A8, col. 1.
The defendant's attorney reported that the civil suit was filed before resolution of the criminal proceedings because of a three-year wait for a civil case trial date.\textsuperscript{28} He also denied that the suit was designed to force the woman to drop the criminal charges.\textsuperscript{29} Others, however, doubted his motives and charged that the civil suit was a blatant attempt to compel the rape victim to drop the criminal charges.\textsuperscript{30}

\subsection*{B. Public Battle}

The press quickly picked up on the story and a public battle raged about the civil suit, as well as general notions about rape. The criminal defendant's attorney asserted that the woman fabricated her story as others had done in the past.\textsuperscript{31} The prosecutor believed that these types of civil suits, if successful, would

\begin{itemize}
\item \textsuperscript{28} Reynolds, \textit{supra} note 26, at A3, col. 1; see also infra note 66.
\item \textsuperscript{29} Misle, \textit{Feminists Blast Claim of Seduction}, Ann Arbor News, July 16, 1987, at A3, col. 5.
\item \textsuperscript{30} Some rape counselors believed that the civil suit was purely a defense strategy designed to intimidate the victim. \textit{Id.} at A6, col. 1; see also Hill, \textit{Accused Rapist Files Suit Against Alleged Victim}, Mich. Daily, July 31, 1987, at 1, cols. 1, 4 (copy on file with U. Mich. J.L. Ref.). One women's rights worker viewed the case as an example of the type of intimidation and pressure women face when they file rape charges. She attributed women's reluctance to testify in rape cases to these sorts of tactics. Misle, \textit{supra} note 29, at A3, col. 5.
\item \textsuperscript{31} Thurtell, \textit{Man Charged in Rape Sues Accuser}, Det. Free Press, Aug. 2, 1987, at 3A, col. 4, 14A, col. 6. Attitudes like these perpetuate the myth that many women fabricate rape charges, especially when the allegations are of date rape. Even Wigmore's noted evidence treatise advances this notion:
\begin{quote}
Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased disarrangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. \textit{One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.}
\end{quote}

\textsc{3A J. Wigmore, Evidence in Trials at Common Law} § 924a, at 736 (Chadborn rev. 1970) (emphasis added).

To dispel the notion that the days when victims needed to prove their chastity and nonconsent are long gone, witness a recent letter to Ann Landers:

\begin{quote}
Date rape is 20-20-hindsight fiction, invented by easy sluts posing as hard-to-
make it harder for prosecutors to convince victims to file charges. He also expressed concern that the civil action might sidestep the protections granted by Michigan's Rape Shield Law.  

In the meantime, the rape victim's attorney attempted to postpone discovery until after the criminal proceedings were resolved.  Finally, just ten days before the scheduled criminal trial date, a judge issued a stay barring discovery in the civil case until after the completion of the rape trial.  

The local newspaper covered the criminal trial prominently. After a six-day trial, the jury found the defendant not guilty of criminal sexual conduct. The defense attorney promptly announced that his client needed a "cooling off period" to decide whether he wanted to continue pursuing the civil suit.

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Letter from "Proud to be a Pig" to Ann Landers, reprinted in Det. Free Press, Apr. 24, 1988, at 2M, cols. 2-3. Although a majority of persons may no longer hold these sentiments, the views still exist and present another obstacle that rape victims must overcome.

For a thorough discussion of the myth that women file false rape reports, see Taylor, Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson, 10 HARV. WOMEN'S L.J. 59 (1987). See also infra notes 112-13 and accompanying text.

33. Soon after filing the civil suit, the criminal defense attorney scheduled the rape complainant's deposition and demanded that she respond to the allegations raised in the civil case. Thurtell, Rape Law's Author Fears Effects of Civil Suits, Det. Free Press, Oct. 4, 1987, at 3A, col. 6.
34. Reynolds, Plaintiff Sought Sex, Sorority Sister Says, Ann Arbor News, Sept. 24, 1987, at A3, cols. 1, 2. It should be noted that the judge was not required to issue such a stay; another judge might have declined to do so.
37. Reynolds, supra note 36, at A1, col. 3. The defendant eventually dropped the civil suit. Thurtell, Man Drops Suit Against Woman Who Claimed Rape, Det. Free Press,
Feminist groups and victims' advocates responded quickly. They expressed renewed concern about the negative effect that civil suits would have on future rape victims contemplating filing charges. Some advocates, including the author of the Rape Shield Law, considered the need to reexamine Michigan's Rape Shield Law.

C. A Trend Begins

At least one other defense attorney filed a civil suit while criminal sexual conduct charges were pending against his client. In the fall of 1987, a woman filed a report with the local police alleging that she had been attacked. The prosecutor filed rape charges against the man accused of the attack, and the defendant responded with a slander suit against his accuser.

Three months later, the judge dismissed the criminal charges on the grounds of insufficient evidence. Again, community members expressed their concern over the use of civil suits as creating a dangerous correlation between the suits and unsuccessful criminal prosecutions.
D. Summary

The two cases have been described above to show the development of a new defense strategy that intimidates rape victims. Whether the outcomes in the two criminal cases were influenced by the civil suits or merely resulted from weak criminal cases is unimportant. Rather, the significance rests on the impact potential civil suits may have on rape victims contemplating initiating criminal complaints. At least one rape counselor reported that the civil suits caused women to hesitate in filing criminal complaints. Because of the obvious threat these suits pose to the protections afforded under the rape shield law, possible legislative remedies must be considered and evaluated.

III. Is Rape Shield Reinforcement Necessary?

The Michigan Rape Shield Law has remained unchanged for fourteen years and has operated effectively. Any changes relating to the rape shield protections may have unintended implications, so revisions must be carefully considered. Perhaps the two civil suits arising from rape charges are isolated incidents that will soon fade into legal history. On the other hand, this new defense strategy may become the norm for rape defense attorneys. If this tactic effectively defeats the goals of the initial rape reform legislation and otherwise misuses the court process, it should be regulated.

A. Summary of Rape Law Reform Goals

Rape reform legislation sought to achieve several goals. They included increasing the number of rape reports and successful prosecutions, improving the treatment of rape victims, achieving comparable legal treatment for rape as that given to other crimes of violence, broadening the range of defined illegal coer-

44. Thurtell, supra note 33, at 17A, col. 2. Some people are concerned that the use of civil suits against rape complainants before the criminal trial is not merely a Michigan phenomenon and may soon occur all over the country. McNamara, Who's Suing Who, Ms., Mar. 1988, at 69; see also Date Rape Countersuit, GLAMOUR, Mar. 1988, at 114.

45. The attorney who filed the first civil action hopes that his strategy will become a model for defense attorneys. He reportedly supplies a "how-to" kit to fellow attorneys who have inquired about this strategy. McNamara, supra note 44; see also supra note 44 and accompanying text.
cive sexual conduct, and expanding the scope of persons protected under the law. Civil suits filed against rape complainants during the criminal prosecutions directly threaten the first two of these goals.

B. Rape is an Underreported Crime

Experts, including law enforcement administrators, agree that rape is a highly underreported crime. There are several reasons for the phenomenon. Rape victims fear retaliation by their attackers, are embarrassed or ashamed, and want to avoid publicity. In one study, victims reported that their main reason for not pressing charges was because they wanted to avoid the ordeal of court. These women are reluctant "to face the barbs and insinuations of the defense attorney" that are unique to rape trials because of the nature of the crime. These anxieties all contribute substantially to the low rape report rate.

Even with rape shield protections, victims who press charges face having to reveal the most violent, humiliating, and personal details of the crime to strangers in medicine, law enforcement, and court administration. They must face their attackers in several criminal hearings, where the details of the rape are constantly replayed. The Rape Shield Law offers one small concession—the victim will not be subjected to irrelevant, public inquiry about her sexual practices.


There is controversy, however, regarding the extent of the underreporting problem. L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE xiv (1983). Experts estimate that only 5-61% of all rapes are reported. See Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 MINN. L. REV. 763, 764 (1986) (statement of Congresswoman Elizabeth Holtzman that only one in 10 rapes are reported); Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 YALE L.J. 1365 (1972) (referring to reports which suggest that only five percent of rapes are reported); Ann Arbor Citizens Advisory Committee on Rape Prevention, 4th Annual Contest on Sexism in Advertising (quoting FBI estimates that one in 10 rapes are reported) (copy on file with U. MICH. J.L. REP.); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1985, at 75 (using 10 or fewer sample cases to estimate that 61% of all rapes committed are reported).

48. FBI CRIME REPORTS, supra note 47, at 22; S. BROWNMILLER, supra note 13, at 387; Galvin, supra note 47, at 796; Note, supra note 47, at 1374.

49. L. HOLMSTROM & A. BURGESS, supra note 47, at 58.

50. Note, supra note 47, at 1374.
C. Undermining of Rape Shield Provisions

Civil suits remove the cloak of the rape shield protections. In the unsupervised and virtually unrestrained atmosphere of a deposition, a rape victim will face questions that are not permitted in criminal discovery or trials.

When deposing the victim, a good defense attorney will do everything in his power to show that no rape actually occurred by focusing on the victim's character and consent to the act. He first lays the preliminary groundwork by asking about the woman's choice of clothing, use of makeup, manner of walking or sitting, tones and language used in conversation, and other provocative behavior.\(^51\) The victim will also respond to questions about whether she frequents bars and parties or goes to other places where she might or should expect to have sexual encounters. The attorney will ask the victim about her level of resistance, whether she kicked, screamed, scratched, bit, or ran away from the defendant. Corroborative proof is no longer required in the criminal trial, but these questions are permissible in the civil case.\(^52\) The inquiries plant a seed of doubt in the victim's mind, causing her to consider whether she somehow encouraged the rape and now must prove that she is not responsible for the attack.

Next, the defense attorney will ask for details of the number and identity of the woman's sexual partners, how often she has sex, what specific sexual activities she engages in, whether she uses contraceptives, or if she has had any vaginal infections. This "evidence" may reveal that because the victim engages in and enjoys sex, it is less likely that the encounter with the defendant was rape. Such information is not relevant to proving the rape in the criminal trial and is not admissible under the Rape Shield Law.\(^53\) No corresponding protection exists in the civil deposition, however, because the defense attorney will demonstrate that this information is likely to lead to other admissible evidence and is permissible under the liberal discovery rules.\(^54\)

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51. For a thorough discussion of the types of questions that a rape victim faces, as well as "the importance of being perfect," see Z. Adler, Rape on Trial 88-120 (1987). Although Adler's study addressed the impact of rape reform legislation on criminal trials, the examples of various categories of questions victims encounter also apply to civil proceedings such as depositions.

52. See supra note 13 and accompanying text.

53. See BenDor, supra note 7, at 159; supra notes 13-14 and accompanying text.

At this point, the victim is in a no-win situation. If she succumbs to the intimidation and requests that the prosecutor drop the criminal charges, the crime against her remains unvindicated. If she continues with the prosecution, she faces a barrage of discovery tactics, under conditions very dissimilar to the criminal proceedings. Aside from exposing numerous details about all aspects of her life, the civil litigant faces a hostile questioner from the start. In the criminal case, the victim is called as a prosecution witness and is first questioned by a friendly examiner whom she already knows. In the deposition, the victim must first face the relentless questions of the defense attorney with little support available to her.

Depositions are trying on all civil litigants, even those with a strong sense of self-esteem and personal security, because they expose people to inquiries into many private areas of their lives. In her deposition, the rape victim also faces these intrusive examinations about the most personal details of her life. She, however, must divide her psychological and physical resources between preparing fully for her testimony in the criminal trial and responding to discovery requests in the civil action.

The additional exposure caused by the threat of a civil action will cause some women who are already reluctant to report their rape to reconsider initiating any proceeding. These civil actions also eliminate the guarantee that rape victims will not face questioning about their sex lives. For these reasons, legislative reform is necessary to reinforce the protections provided by the current rape shield law.

IV. PROPOSED REFORM

There are several possible methods of reinforcing the rape shield protections. The legislature could simply abolish the causes of action alleged in these civil suits. Another remedy would be to prohibit any criminal defendant from bringing a civil suit prior to the termination of the criminal proceedings. A

55. The deposition is held in a private office, with only the parties, their attorneys, and a court reporter present. During the criminal trial, the rape victim will rely on the supportive presence of family, friends, and victim advocates. These people will not be present during the civil discovery process.

56. In the deposition, the role of the victim's attorney is basically limited to objecting to improper questions to preserve the issue for trial. In most instances, the victim must answer despite her attorney's objections to the questions. Mich. Cr. R. 2.302(B), 2.306(D).
narrower solution would apply specifically to a defendant in a criminal sexual conduct case, limiting his ability to file a civil action against his accuser until after the criminal trial has ended. Although each of these options will be considered below, the last option is the most practical.

A. Possible Legislative Actions

The legislature has constitutional and statutory authority to eliminate causes of action through its power to define the scope of a court’s jurisdiction. Common law torts, such as defamation, intentional infliction of emotional distress, malicious prosecution, and abuse of process, fall within the legislature’s power to abolish. The United States Supreme Court leaves the determination of the appropriate standard of liability in these actions to the states. The one obvious limitation is that such liability cannot result from a citizen’s exercise of his constitutionally protected rights. Abolishing a cause of action is a drastic, but not unprecedented, move.

Neither legislators nor their constituents are likely to support an across-the-board abolition of defamation and similar causes of action. This solution would leave countless deserving, potential litigants without a remedy for wrongs that society desires to see compensated. It also goes beyond the necessary solution for the unique problems presented by civil actions filed against complainants in criminal actions.

Another proposal would be to prevent all criminal defendants from filing any civil action such as defamation, abuse of process, or intentional infliction of emotional distress. Again, this solution is far too broad and overreaching. In addition, it has no rational justification and could be successfully challenged as a violation of equal protection.

57. Mich. Const. art. VI, § 13 reads in part: “The circuit court shall have original jurisdiction in all matters not prohibited by law” (emphasis added). Mich. Comp. Laws § 600.605 (1979) reads: “Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where... the circuit courts are denied jurisdiction by the constitution or statutes of this state” (emphasis added).
59. Id.
A narrower solution would be to prohibit any criminal defendant from bringing any civil action against someone involved with the criminal case until after those proceedings are terminated. This could be accomplished by removing the circuit court's jurisdiction to hear and decide such actions, making it a matter proscribed by law. For example, a defendant charged with embezzlement would be unable to sue his employer for tort damages arising from an automobile accident until after the criminal trial. This type of restriction is overbroad and unnecessarily "corrects" nonproblems.

A more carefully tailored and desirable solution is to restrict the court's jurisdiction to hear and decide civil actions brought by rape defendants against complainants in the criminal sexual conduct case. This method assures the continuation of rape shield protections for the duration of the criminal trial while still preserving a citizen's right to file a civil action.

B. Proposed Model Statute

MODEL STATUTE

Be it enacted:

(1) In any civil action, commenced by a defendant in a criminal action for criminal sexual conduct or assault with intent to commit criminal sexual conduct, that is filed against a victim of the crime for which the defendant is charged, the circuit court shall have no jurisdiction to hear or decide the matter during the period of time in which the criminal trial proceedings are pending, provided that:

    the civil action is based on statements, reports, or other references to any incident from which the criminal action is derived.

(2) The period of limitations for bringing a civil action described in Section 1 is tolled for the period of time during which the criminal action is pending in a trial court of this state, another state, or the United States.

62. Some of the language of this proposal is derived from ongoing discussions with and drafts produced by Michigan Representative William Van Regenmorter, Kathryn
C. Purposes and Analysis of the Model Statute

The Model Statute accomplishes several purposes. First, the rape shield protections presently guaranteed by statute remain intact in both the criminal and civil proceedings until the criminal trial is finished. The woman will not have the threat of a civil suit hanging over her as she cooperates in the rape prosecution. Limiting the frightening and intimidating possibility of a damages suit encourages victims to come forward and report the rape. Society has a strong interest in prosecuting criminal sexual conduct and cannot do so unless victims report the offense.

Second, the statute preserves a criminal defendant's right to file a civil suit against his accuser. He still can bring an action for defamation, intentional infliction of emotional distress, or other civil wrongs. If the purpose of the civil case is to seek compensation for the wrong (the traditional damages remedy), the Model Statute does not extinguish this right. He will be able to gain this very remedy at the eventual civil trial. On the other hand, if the primary purpose of the suit is to harass and intimidate the rape victim into dropping the criminal charges, the Model Statute protects the judicial system from this abuse of its resources.

Under the Model Statute, the defendant in a criminal sexual conduct case must wait to file a related civil action against his accuser until the criminal proceedings against him are resolved. This delay will typically be short in duration. Criminal sexual conduct cases are covered by a special speedy trial provision in the Crime Victim's Rights Act, as well as the speedy trial provisions of the federal and state constitutions, and state statutes. One local prosecutor estimated that a criminal sexual

Bachman (legislative assistant to Representative Van Regenmorter), and Scott Banas (administrative aide to Michigan Senator William Faust).

63. The traditional remedy for defamation and other tort actions is money damages. A plaintiff in this type of case is not entitled to an equitable remedy because there is no evidence demonstrating that the customary damages remedy is inadequate. More importantly, an injunction obtained in a defamation suit would impose a prior restraint of speech in violation of the first amendment. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (1984). In addition, courts continue to expand, rather than limit, protections for speech alleged to be defamatory. Id. at 109-10 (Supp. 1988).

64. MICH. COMP. LAWS ANN. § 780.759 (West Supp. 1987).

conduct trial is completed four to six months after the charges are filed.66

The tolling of the statutes of limitations for civil actions, as provided for in the Model Statute, may work to the criminal defendant's benefit. Many torts have very short limitations periods; defamation actions, for example, must be filed within one year.67 The Model Statute effectively increases the amount of time a defendant has to consider bringing a civil action.

In most, if not all cases, a civil suit will never begin prior to the termination of the criminal sexual conduct proceedings because the Model Statute removes the circuit court's jurisdiction over these specific matters. The rape complainant, therefore, will not have to hire an attorney to answer a complaint and defend her in the suit.68

If the civil case is mistakenly accepted by the court clerk, the court must dismiss it because it lacks jurisdiction to hear the matter.69 This automatic dismissal saves the rape victim from having to retain counsel to file a motion to dismiss the case because the court lacks jurisdiction. Because the civil action is stopped before it begins, the rape victim will not face immediate discovery requests and cannot be deposed. She therefore will not face unwarranted intrusions into her personal life in the form of questions that are prohibited in the criminal trial under the Rape Shield Law.

D. Suggested Administrative Procedures

Implementation of the Model Statute requires modification of current administrative procedures. Particularly, cases covered by the statute must be identified at the time of filing so that no

66. Interview with Libby Pollard, Assistant Prosecutor, Washtenaw County, Michigan, in Ann Arbor, Michigan (Apr. 7, 1988); see also supra note 27 (indicating trial in first case discussed was originally scheduled for three months after the arraignment). Rape trials are completed within a rather short time period. This circumstance weakens defense attorneys' argument that a civil suit against a rape victim must be filed during the criminal proceedings in order to avoid a long delay in requesting a civil trial date. See supra note 28 and accompanying text.

67. MICH. COMP. LAWS § 600.5805(7) (1979). Other likely theories to be raised in these type of civil actions have two-year (malicious prosecution) or three-year (all other actions) limitations periods. Id. §§ 600.5805(3), .5805(8).

68. When a woman files a rape complaint, she does not need to retain her own legal counsel because the prosecutor represents her interests in the criminal proceedings. The prosecutor cannot represent her in a private civil action.

rape victim will face a suit initiated prior to the statutory filing date. Some relatively simple modifications of the filing procedures under the Michigan Court Rules can achieve this goal.

Presently, every civil pleading must include a statement by the plaintiff's attorney (or the plaintiff, if acting pro se) that there is no other civil action pending between the parties that arises out of the "same transaction or occurrence" as alleged in the complaint. The plaintiff could also be required to indicate that there is no pending criminal action related to allegations forming the basis of the civil complaint. Additionally, the court could require that the plaintiff attach a copy of the final criminal decision to the civil complaint for easy and instant verification. If the caption identified a pending criminal action, it would "flag" the complaint for further inspection prior to the time the court files the case and issues a summons.

This proposed requirement for pleadings would provide a simple administrative measure to implement the Model Statute. It is self-policing because attorneys will investigate whether there are pending criminal proceedings that are covered under the Model Statute prior to filing a civil complaint. This inquiry is necessary because the lawyer must sign the required caption statement and faces sanctions if the statement is false.

A second possible administrative safeguard would be to create a new code for file numbers assigned to civil actions arising from prior rape accusations. When the court clerk examines the pa-

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70. The required language reads: "There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge." Mich. Ct. R. 2.113(C)(2)(a). If such an action is pending, an alternative caption indicating this fact is required. Mich. Ct. R. 2.113(C)(2)(b).

71. This statement could read: "There is no criminal action pending relating to, arising out of, or deriving from the facts and allegations contained in this complaint." An alternative statement for when criminal proceedings are still pending could read: "A criminal action relating to, arising out of, or derived from the facts and allegations contained in this complaint is now pending in ____________ Court and is No. _____________. The case was assigned to Judge _____________.

The Michigan Supreme Court promulgates the procedural court rules and is responsible for the administration of the courts. Mich. Const. art. VI, § 5. Therefore, the legislature can suggest, but not enact, this type of modification.

72. Mich. Ct. R. 2.113(C)(2), 2.114(D)-(E). These sanctions also apply to a party acting pro se. The rules require the attorney to sign the pleadings, certifying that he has read them, has made a reasonable inquiry into the matters alleged in the complaint, and believes that the pleading is warranted under existing law. Mich. Ct. R. 2.114(D)(1)-(2).

73. Persons filing a civil case in Michigan must assign it a case-type code, based on the principal subject matter of the action. Mich. Ct. R. 8.117. The current codes for civil damage suits are classified as personal injury, auto negligence; property damage, auto negligence; products liability; malpractice; other personal injury; and other damage suits.
pers when they are presented for filing, the new code would alert him that this case is related to rape allegations. He then would examine the complaint’s caption statement to assure that a criminal sexual conduct action is not pending and could verify it by checking the attached copy of the final criminal decision.\textsuperscript{74}

E. Michigan Legislative Proposal

The Michigan House of Representatives is considering a bill regarding the same issues addressed by the Model Statute. Michigan H.B. 5760 reads in pertinent part:

(2) A defendant in a criminal action for criminal sexual conduct in any degree or assault with intent to commit criminal sexual conduct shall not commence a civil action against a victim of the crime for which the defendant is charged if both of the following circumstances exist:

(A) The criminal action is pending in a trial court of this state, of another state, or of the United States.

(B) The civil action is based upon statements or reports with reference to an incident from which the criminal action is derived.

(3) A civil action commenced in violation of subsection (2) shall be dismissed without prejudice by the court upon the motion of a party in the civil action or upon the court’s own motion.\textsuperscript{75}

This bill and the Model Statute share the common goal of protecting a rape victim from intimidating civil suits. The proposals differ in approach, however, to the extent that H.B. 5760 does not specifically remove the court’s jurisdiction over the criminal defendant’s suit against the rape victim. Instead, the bill would entitle the woman to a dismissal of the action \textit{upon motion} of a party or the court. In the days of crowded dockets and overworked courts, it is unrealistic to expect the court, on its own initiative, to determine immediately if the case comes under the terms of H.B. 5760 by reviewing the contents of the

\textsuperscript{74} For example, when a person files a complaint alleging medical malpractice, the case-code assigned to it would be No. 88----NM. \textsuperscript{75} H.B. 5760, 84th Leg., Reg. Sess. (1988).
complaint. Therefore, to enforce her rights under the bill, the rape victim would need to hire a lawyer to respond to the civil action and file a motion for dismissal. This statutory approach forces the woman to participate in the civil litigation until the court grants the dismissal.

The bill does not eliminate the intimidation factor presented by the initiation of the civil action itself. While preparing for the criminal trial, the rape victim will be served with a civil complaint, summons, and discovery requests in a suit filed in violation of H.B. 5760. Her name will appear on these formal legal papers, and she will read that she is being sued for more than $10,000. She then must seek legal assistance to address the new problem created by her filing of a rape complaint. Being named as a party in a legal action is frightening and intimidating for most people. The rape victim may react by considering dropping the criminal charges, seeking to avoid the ordeal of proceeding in the criminal and civil courts.

It is unclear how H.B. 5760 would be implemented in practice. The proposed bill requires the criminal defendant or his attorney to determine if the anticipated civil action is prohibited by the statute. Under the Model Statute, however, the proposed administrative procedures would allow the court to determine instantly that it has no jurisdiction over the matter based on the face of the complaint and the case would not be filed. As proposed in H.B. 5760, the case would proceed until the court grants a motion for dismissal.

The proposed Model Statute best addresses the unique problems posed by civil suits filed against rape complainants prior to the resolution of the criminal proceedings. It reinforces the limited rape shield protections against inquiry into a rape victim’s sexual habits and may better serve society’s interest by encouraging otherwise reluctant women to report the crime. It also preserves the rights of defendants to bring any appropriate damage suits against their accusers after the criminal action is terminated. Finally, the Act can be implemented through simple and efficient administrative procedures.

76. A complaint filed in circuit court must contain allegations that the relief sought exceeds the $10,000 jurisdictional requirement. Mich. Ct. R. 2.111(B)(2). If the damages requested were less than $10,000, the district court would have jurisdiction over the matter. Mich. Comp. Laws § 600.8301 (1979). A criminal defendant will almost certainly request damages greater than $10,000 in his suit against the rape victim, and the complaint will contain a statement reflecting this.
V. ANTICIPATED RESPONSES TO THE MODEL STATUTE

Criminal defense attorneys will oppose the Model Statute because it eliminates a recently conceived and powerful defense tactic. Although the proposal raises potential constitutional and other issues, these claims are easily rebutted.

A. Right of Access to Courts

Many people assume that they have a right to sue in the civil courts. Although public policy encourages free access to the courts, there is no fundamental right to a particular cause of action.

1. Right to a cause of action and equal court access—There is no fundamental right in a civil cause of action because the legislature creates and allows the causes of action to be raised in the state’s courts. It also can abolish certain causes of action and has done so in the past. Without a valid cause of action, a person cannot bring suit in the courts. Because a cause of action is not a fundamental right, a restriction on it is subject to equal protection challenge only if it bears no reasonable relationship to a legitimate governmental interest. A criminal defendant’s attack of the Model Statute on these grounds will fail this “rational basis” test. The classification and limits of the Model Statute clearly relate to the state’s vital interest in prosecuting rapes and enforcing its Rape Shield Law. The statute therefore survives the rational basis test and does not violate the defendant’s equal protection right.

The United States Supreme Court has examined on occasion a litigant’s right to equal access to courts. The issue presented in those cases, however, related specifically to wealth-based restric-

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79. Some causes of action arise under common law as opposed to statutes. The legislature, however, retains the power to modify or abolish existing common law actions. Mich. Const. art. VI, § 13; Mich. Comp. Laws § 600.605 (1979).
80. See supra notes 57-60 and accompanying text.
81. The basic constitutional test for all equal protection challenges is one of reasonableness or minimum rationality. See L. Tribe, American Constitutional Law § 16-2, at 1439 (2d ed. 1988); see also J. Nowak, R. Rotunda & J. Young, Constitutional Law 423 (2d ed. 1983) [hereinafter J. Nowak] (legislation must rationally relate to a legitimate governmental end). The more stringent strict scrutiny test applies only when the challenge involves a fundamental right or a “suspect” classification. See infra notes 101-02 and accompanying text.
tions. If a state opens its courts to litigants by creating or recognizing particular causes of action, it cannot limit that opportunity to financially able litigants. Additionally, if the state controls the basic conflict resolution process, such as litigation, it should not close it off to any group in advance merely on the basis of a litigant's financial condition. The Model Statute creates no economic barriers to court access and does not prohibit a criminal defendant from pursuing his damages claims in the state courts. The Statute merely determines the time at which these claims will be heard.

Because the legislature creates or allows a given cause of action, it may limit a litigant's access to the courts through reasonable time limits. Traditionally, these limits are in the form of varying statutes of limitation. This restriction means that an otherwise valid cause of action will not be recognized or heard by the courts if the suit is not brought within the designated time period. The Model Statute imposes a similar restraint to that dictated by a statute of limitation. The difference is that the Model Statute determines when the action may begin instead of when it can no longer be considered.

2. Undue time limitations— The Model Statute restricts court access through carefully limited time constraints placed solely on criminal sexual conduct defendants. Statutes of limitation impose different burdens on an individual litigant depending on the identity of the parties involved and nature of the action. For example, the Michigan Supreme Court held that a legislative classification did not violate a plaintiff's equal protection right by setting a two-year statute of limitation for bringing a highway negligence action against a governmental entity and a three-year limitation on the same action against a private tortfeasor. In that case, the plaintiff was bound by the rules.
applicable to the particular defendant based on the defendant's public or private status.

The Model Statute restricts the time when specific plaintiffs may bring certain civil suits because of a civil defendant's status as a rape victim involved in a pending criminal trial. The criminal defendant is bound by the legislative restriction as to when specific civil actions can be maintained, much as statutes of limitation restrict the period during which persons may bring other causes of action.

3. Limits on court jurisdiction—The legislature can eliminate causes of action by removing or restricting a court's jurisdiction to hear and decide particular matters. The Michigan Legislature acted in this fashion in at least two areas: workers' compensation and no-fault automobile insurance coverage.

An employee who sustains a work-related injury finds her exclusive remedy in workers' compensation, as opposed to bringing an otherwise available action for damages against her employer. The legislature created this administrative remedy to protect workers and guarantee compensation in the event of injury. This type of legislative elimination of a court remedy is not entirely analogous to the limitation proposed by the Model Statute, however. Lawmakers set up an elaborate administrative bureau, board, and set of procedures to administer the workers' compensation act. These provisions create, in effect, an alternative tribunal for injured workers. An alternative tribunal is not necessary under the Model Statute because defendants retain the right to pursue a remedy in court under the specific terms of the Act.

As in the Model Statute, a substitute tribunal is not included in Michigan's no-fault automobile insurance law. Persons injured in automobile accidents cannot sue the other driver unless the accident resulted in death, serious impairment of bodily function, or permanent serious disfigurement. The typical accident victim must seek compensation from her insurance carrier. Criminal sexual conduct defendants, of course, do not have insurance to compensate them for their losses. Under the Model Statute, their remedy remains unlimited in the courts, after a short tolling period. The no-fault statute, as well as the workers' compensation law, show that the legislature has restricted access

87. Mich. Const. art VI, § 13; Mich. Comp. Laws § 600.605 (1979); see also supra notes 57-60 and accompanying text.
to the courts for certain categories of potential plaintiffs in the interest of furthering public policies. This same type of restriction is appropriate in matters related to criminal sexual conduct cases.

B. Equal Protection Issues

The Model Statute does not violate equal protection. Any challenge to the Act on these grounds will be unsuccessful because (1) there is no constitutional right to access to the courts to pursue a civil cause of action; (2) if the United States Supreme Court established a first amendment right of access to the courts, the Model Statute would withstand the appropriate strict scrutiny analysis; (3) criminal sexual conduct defendants are not a protected class under the fourteenth amendment, and the Model Statute meets the requisite minimum rationality requirement; and (4) the Model Statute's limitation on the conditions for filing a civil action is not of the type traditionally held unconstitutional.

1. First amendment right to petition— Some people may claim a fundamental right of access to the courts under the right to petition clause of the first amendment. The clause reads: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The right to petition is considered to be an element of the broad right to freedom of expression. It includes a right of access to all branches of government and is not limited to religious or political causes.

In some circumstances, the United States Supreme Court has held that a prisoner or criminal defendant has a constitutional right of access to the courts. The Court has not reached the question as to whether the right to petition clause creates a fundamental right of access to courts in civil cases. One Michigan

91. U.S. CONST. amend. XIV, § 1 reads in part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."
92. U.S. CONST. amend. I. Although the first amendment applies only to the federal government, it is made applicable to the states through the due process clause of the fourteenth amendment. Hague v. C.I.O., 307 U.S. 496 (1939).
93. See J. Nowak, supra note 81, at 1005.
appellate court panel hinted that there may be a fundamental right to pursue a cause of action, and therefore litigants cannot be denied access to the civil courts. 97

It is important to note that the Model Statute does not deny a criminal defendant access to the civil court but merely postpones the time for bringing a suit against a rape complainant. 98 In addition, the delay will be relatively short because a criminal trial must be resolved quickly under the speedy trial provisions. 99

Even if the United States Supreme Court ultimately held that the right to petition clause grants a right of access to civil courts to pursue a cause of action, the Model Statute would survive constitutional challenge. 100 The Model Statute would be attacked on equal protection grounds because it restricts court access for only rape defendants who file defamation and similar torts actions. Because the right to petition is fundamental, any government restriction of the right would be subjected to strict scrutiny analysis. 101

Under strict scrutiny analysis, the government has the burden of demonstrating that the restriction is narrowly tailored to serve a compelling governmental interest. 102 The Model Statute meets this test. It is very limited in scope. It applies only to the small category of persons involved in pending criminal sexual conduct trials. Further, it governs only the limited time period during which the criminal charges are pending. The criminal defendant does not lose his right to sue his accuser under state tort law. He also does not suffer because of the delay in filing his civil complaint because the Act provides for a tolling of the applicable statutes of limitation. The Model Statute on its face is

97. Moore v. Fragatos, 116 Mich. App. 179, 185-86, 321 N.W.2d 781, 784-85 (1972). The Moore court held that a civil litigant’s waiver of the “constitutional right to access to the courts” must be tested by the same knowing, voluntary, and intelligent requirements afforded criminal defendants. Id. at 186, 321 N.W.2d at 785. Although the court implied that the right to pursue a civil cause of action is fundamental, it did not reach a conclusion on this issue.

98. See infra note 111 and accompanying text.

99. See supra notes 27, 65-66 and accompanying text.

100. This equal protection challenge would assert that the Model Statute violates the first amendment as applicable to the states through the fourteenth amendment. The challenge would not be based on the due process clause because the statute does not apply to all persons. J. Nowak, supra note 81, at 423. Instead, it relates to the limited group of defendants in criminal sexual conduct cases and is therefore subject to attack under the equal protection clause. Id.

101. L. Tribe, supra note 81, § 16-7. The strict scrutiny standard is applied when a government seeks to interfere with a fundamental right in order to “preserve substantive values of equality and liberty.” Id. § 16-6, at 1451.

102. See J. Nowak, supra note 81, at 448-49.
narrowly tailored and meets the first prong of the strict scrutiny test.

The state has a vital interest to prosecute rapes under its police power without interference. Through its criminal laws, the state proscribes certain conduct that is harmful to its citizens. Through the criminal process, it enforces these prohibitions. Within constitutional limits, the state has established proper procedures for prosecuting criminal sexual conduct, including a specific rape shield provision.\(^{103}\)

Civil suits filed against rape victims while the criminal charges are pending undermine the state's ability to prosecute rapes and enforce the rape shield guarantees. The prosecutor needs the victim to testify at the criminal trial and otherwise cooperate in the prosecution. The concurrent civil action impedes this effort because the rape victim is frightened and intimidated by the suit pending against her and must redirect her attention to defending herself. She also will be subject to questioning not permitted by the Rape Shield Law and will seek to avoid any additional harassment. By tolling the time period during which a rape defendant can sue his accuser, the state guarantees that it can continue unimpeded with the prosecution. This state interest is an overriding and compelling one and meets the second prong of the strict scrutiny test. The Model Statute therefore does not violate the equal protection clause of the fourteenth amendment.

2. Discrimination against a particular group—To prove that the Model Statute violates their equal protection rights, criminal sexual conduct defendants must demonstrate that they constitute some type of protected class.\(^{104}\) Traditionally, suspect categories are restricted to race, national origin, and sometimes alienage.\(^{105}\) If a government regulation singles out people on the basis of one of these classifications, the government action is subject to strict scrutiny analysis under the equal protection clause.\(^{106}\) Rape defendants do not fall into those classes. Because the Model Statute does not impose regulations on the basis of any of these suspect categories, it is not subject to strict scrutiny.

When a statute is challenged by a member of a group not falling within one of the suspect categories listed above, the United

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104. See L. Tribe, supra note 81, §§ 16-2, 16-3; J. Nowak, supra note 81, at 592.
105. J. Nowak, supra note 81, at 592.
106. Id.
States Supreme Court employs a rational basis test to determine if the regulation withstands constitutional muster.\(^{107}\) Even if the Supreme Court carved out a new equal protection category for criminal defendants, the challenged statute would be subjected to low-level scrutiny.\(^{108}\) As discussed previously,\(^{109}\) the Model Statute clearly advances the legitimate state interest in prosecuting criminal sexual conduct, enforcing the constitutionally sound rape shield protections,\(^{110}\) and protecting rape victims from harassment.

C. Denial of Justice

Some states have constitutional or statutory provisions that forbid the delay or denial of justice.\(^{111}\) Even though Michigan has no such requirements, the Model Statute does not, in any event, deny criminal defendants justice.

A person covered by the Model Statute still can bring a civil damage action against his accuser, receive financial compensation, and be made whole. Delaying the commencement of the civil action until after the termination of the criminal proceedings does not fundamentally affect this right. The defendant is entitled to identical remedies, regardless of when the suit was initiated. The statute further protects a defendant's interest by tolling the limitations period for filing the civil action for the duration of the criminal proceedings. This provision actually extends the period for him to build his case and consider filing suit.

\(^{107}\) Id. at 596; see L. Tribe, supra note 81, § 16-2.

\(^{108}\) The Supreme Court continually has refused to expand the traditionally suspect categories entitled to strict scrutiny analysis of challenged statutes. The Court has, however, created a type of "middle-level" scrutiny under very specific and limited circumstances. J. Nowak, supra note 81, at 593. The middle-level analysis requires that the government’s classification have a substantial relationship to a legitimate or important interest. Id. This analysis has been used in specific cases involving discrimination based on gender, illegitimacy, and undocumented aliens. Id. There is no reason to believe that the Court would include criminal sexual conduct defendants with these special types of groups. Even if it did, the Model Statute would survive this type of moderate scrutiny.

\(^{109}\) See supra note 81 and accompanying text.

\(^{110}\) See supra text accompanying notes 22-23 for a discussion of unsuccessful constitutional challenges to the Rape Shield Law.

\(^{111}\) See 16A AM. JUR. 2d Constitutional Law § 613, at 557-58 & n.44 (citing cases and constitutions of several states). These provisions derive from the Magna Carta and its purpose of prohibiting the King from selling justice to the highest bidder. Id. at 558-59. The Model Statute imposes no burden based on a litigant's ability to pay and is not contrary to the protections afforded litigants.
Finally, some people will assert that the Model Statute will encourage women to file false reports. This fallacy grows out of the historical belief that women simply fabricate rape charges. Critics advanced this same fabrication argument at the time the Rape Shield Law initially was enacted. The anticipated deluge of false complaints never materialized. Studies have demonstrated that the rate of false rape reports filed corresponds to the rate of false reports for other violent crimes—two percent.

It is highly unlikely that a reinforcement of the rape shield protections, as provided for in the Model Statute, will bring a flood of false reports. A women simply will not subject herself to the rigors of a public rape prosecution because the Model Statute will shield her from a civil suit during the criminal proceedings. The limited reprieve from being sued would not justify enduring the burden and humiliation of revealing intimate details about her life to doctors, lawyers, judges, and courtroom observers. Additionally, the Act would not insulate a complainant who falsified a rape report from subsequent civil damage actions and criminal sanctions.

VI. Conclusion

Michigan led the nation in 1974 when it enacted this country's first rape shield law. The Act encouraged women to report rapes by prohibiting the intrusive and often brutal cross-examination of a victim's past sexual conduct. Unfortunately, Michigan was also in the lead when a defense attorney adopted the strategy of filing a civil suit against his client's accuser prior to the resolution of the pending rape charges. The civil suit effectively negated the rape shield protections and became a weapon for intimidation because the rape victim was immediately subject to deposition, where no similar protections exist.

112. One author refers to this argument as "the cherished male assumption that female persons tend to lie." S. BROWNMILLER, supra note 13, at 369. One defense attorney stated that there is "a greater temptation to fabricate a story if the law will protect you." Dzwonkowski, Rape Law Up for Test in Court, Det. Free Press, Jan. 1, 1984, at 3A, col. 5, 6A, col. 1; see also supra note 31 and accompanying text.

113. See S. BROWNMILLER, supra note 13, at 387; see also Z. ADLER, supra note 51, at 25, 53; J. MARSH, A. GEIST & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM 90-91 (1982) (revealing that a majority of the prosecutors, police, defense attorneys, and judges believed that the fabrication rates were about the same as that for other crimes).
Legislative reform is needed to reinforce the protections guaranteed by the rape shield provision. The Model Statute maintains the rape shield protections for the duration of the criminal trial and at the same time preserves the defendant's right to bring a civil damages action. It should survive any legal attacks by defense counsel and others.

Michigan once again has the unique opportunity to be on the legislative forefront and should enact this reinforcement of its Rape Shield Law. Rather than waiting to respond to a full-blown crisis, the legislature can take a proactive step and stop the potential abuse of the legal system caused by civil actions against rape victims.

—Catherine L. Kello