LAWYERS FOR #USTOO: AN ANALYSIS OF THE CHALLENGES POSED BY THE CONTINGENT FEE SYSTEM IN TORT CASES FOR SEXUAL ASSAULT

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ABSTRACT

According to the National Sexual Violence Resource Center, one in five women will be raped at some point in their lives, and one in three women will experience some form of sexual violence. Despite the widespread prevalence of sexual assault, it is the country's most under-reported crime. These illustrative statistics are alarming and suggest that current criminal law approaches to the sexual assault epidemic are inadequate, both in meeting the needs of survivors and in holding perpetrators accountable. These inadequacies have the potential to become even more widely experienced in light of movements like #MeToo, given that survivors may now be more willing to come forward, seek support, and engage with the legal system. Given these realities, scholars have begun to explore alternatives to criminal prosecutions for sexual assault, and many have identified tort law as a potential alternative path. However, tort law is generally underused, despite its potential to provide sexual assault survivors with a variety of benefits. This Note aims to provide a structural explanation for why more sexual assault claims are not successfully pursued in tort. Specifically, this Note explores how the contingent fee system and tort reform may affect the frequency and type of sexual assault cases plaintiff-side lawyers are willing to accept and bring to trial. This Note draws on both quantitative data and informal attorney interviews to demonstrate how tort reform statutes influence attorney decisionmaking in sexual assault cases, and how attorney screening decisions in the aggregate may foreclose legal recourse for survivors in

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a way that is normatively undesirable. This Note then proposes changes to existing systems of criminal restitution in order to address the compensatory, retributive, and deterrence gaps created by the current legal scheme.

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INTRODUCTION

On October 5, 2017, the *New York Times* published an article exposing nearly three decades of sexual harassment and assault allegations against Harvey Weinstein.[1] Days later, on October 15, Alyssa Milano posted a tweet encouraging women who had experienced similar episodes of sexual harassment or assault to post on Twitter using the hashtag #MeToo.[2] This tweet, reigniting a phrase initially coined by Tarana Burke in 2006,[3] sparked what is now known as the #MeToo movement.[4] In recognition of this movement's power and importance, Time Magazine named "The Silence Breakers," figures who have publicly spoken out against the "inappropriate, abusive and in some cases illegal behavior they've faced," as its Person of the Year 2017.[5] In an effort to make this movement more inclusive and solutions-oriented, a group of more than 300 women in Hollywood banded together to form Time's Up, "an effort to counter systemic sexual harassment not just in the entertainment industry, but also in industries across the country . . . through legal recourse."[6] The #MeToo movement and its successor Time's Up have cast a spotlight on the pervasive magnitude of the sexual assault problem in the United States and the current lack of meaningful or systematic solutions.[7]

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1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (on file with the *Columbia Human Rights Law Review*).

2. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [https://perma.cc/82YT-VWQG].

3. Sandra Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html (on file with the *Columbia Human Rights Law Review*).

4. Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/JH8V-9V22].

5. Stephanie Zachareck et al., *The Silence Breakers*, TIME (Dec. 6, 2017), http://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/X86E-FVWV].

6. Megan Garber, *Is This the Next Step for the #MeToo Movement?*, ATLANTIC (Jan. 2, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/beyond-metoo-can-times-up-effect-real-change/549482/ [https://perma.cc/TDZ7-D5D5].

7. Krista M. Anderson, *Twelve Years Post* Morrison*: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 HARV. J.L. & GENDER 224, 225 (2013) (explaining how, despite extensive attempts

According to the National Sexual Violence Resource Center, one in five women will be raped at some point in their lives, and one in three women will experience some form of sexual violence.[8] Despite the widespread prevalence of sexual assault, it is the country's most under-reported crime.[9] The Rape, Abuse & Incest National Network (RAINN)[10] reports that only 20% of rapes reported to the police lead to arrest, and only about 4% of reported rapes are referred to prosecutors.[11] In the period from 2005–2010, more than a third of survivors who opted not to report cited shortcomings of the criminal justice system as a key reason for not disclosing these incidents to law enforcement agents.[12]

These statistics are both alarming and illustrative, suggesting that current criminal law approaches to the sexual assault epidemic are inadequate, both in meeting the needs of survivors and in holding perpetrators accountable. These inadequacies have the potential to become even more widely experienced in light of movements like #MeToo, given that survivors may now be more willing to come forward, seek support, and engage with the legal system.[13] Given these

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at reform, the criminal justice system "has proven incapable of deterring or punishing rape or providing justice for millions of rape survivors").

8. *Get Statistics*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/node/4737 [https://perma.cc/G6F5-W553]. RAINN reports that as many as one in six American women have been the victim of an attempted or completed rape. *Scope of the Problem: Statistics*, RAPE, ABUSE, INCEST NAT'L NETWORK, https://www.rainn.org/statistics/scope-problem [https://perma.cc/E967-7WHA].

9. *Get Statistics*, *supra* note 8 ("63% of sexual assaults are not reported to police.").

10. RAINN is the largest anti-sexual violence organization in the United States, carrying out "programs to prevent sexual violence, help survivors, and ensure that perpetrators are brought to justice." *About RAINN*, RAPE, ABUSE, INCEST NAT'L NETWORK, https://www.rainn.org/about-rainn [https://perma.cc/836Q-G4CV].

11. RAINN reports that, out of every 1,000 rapes, only 230 are reported to police. Only forty-six of these reports typically result in arrest. Out of the 230 rapes reported to police, only nine cases are typically referred to prosecutors. *The Criminal Justice System: Statistics*, RAPE, ABUSE, INCEST NAT'L NETWORK, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/KW8D-AENC].

12. Of the individuals who provided reasons for non-disclosure, 20% reported fearing retaliation, 13% reported believing the police would not do anything to help, and 2% reported the police could not do anything to help. *Id.*

13. *See* Martha Chamallas*, Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 44 (2018) [hereinafter Chamallas, *#Me Too Moment?*] (describing the author's hope that #MeToo might lead to a transformation in tort law that serves to "disrupt, rather than reinforce, the forces of gender inequality"); *see also* Rebecca Seales, *What Has #MeToo Actually Changed?*, BBC (May 12, 2018),

realities, scholars have begun to explore alternatives to criminal prosecutions for sexual assault, and many have identified tort law as a potential alternative path.[14] However, tort law is generally underused,[15] despite its potential to provide sexual assault survivors with a variety of benefits.[16]

This Note aims to provide a structural explanation for why more sexual assault claims are not pursued successfully in tort. Specifically, this Note explores how the contingent fee system and tort reform[17] affects the frequency and type of sexual assault cases plaintiff-side lawyers are willing to accept and bring to trial. This Note draws on both quantitative data and informal attorney interviews to demonstrate how tort reform statutes influence attorney decisionmaking in sexual assault cases, and how attorney screening decisions in the aggregate may foreclose legal recourse for survivors in a way that is normatively undesirable. This Note then proposes changes to existing systems of criminal restitution in order to address

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https://www.bbc.com/news/world-44045291 [https://perma.cc/FSZ3-YJV2] (stating that "[f]rom October to December 2017, calls to [RAINN] . . . rose by 23% compared with the same period in 2016" and that 1in6, a non-profit that supports male survivors, has reported "a 103% increase in the use of [their] online helpline service between September and October 2017").

14. *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 68 (2006) [hereinafter Bublick, *Lessons for Courts*]; Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 407 (2013) [hereinafter Swan, *Triangulating Rape*].

15. Chamallas, *#Me Too Moment?*, *supra* note 13, at 45 (pointing out the relative infrequency of successful recoveries in tort for sexual assault); Bublick, *Lessons for Courts*, *supra* note 14, at 68 (stating that there is reason to believe that survivors could file tort suits against their attackers more routinely); Anderson, *supra* note 7, at 226 (identifying that the "proportion of rape survivors who file civil suits is extremely low"); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 31–32 (2011) (noting that civil suits for rape and sexual assault are still relatively rare).

16. Ellen Bublick & Jessica Mindlin, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 1, 2–5 (Sept. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_CivilTortActions.pdf [https://perma.cc/KD4X-TKMD].

17. For the purposes of this Note, the term "tort reform" refers to "efforts by state and federal legislatures to place limitations on the amount of damages that can be recovered by individuals in certain [tort] cases." These measures include statutory caps on noneconomic and punitive damages. *See Oppose Tort Reform*, NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, https://theconsumervoice.org/uploads/files/issues/CVTortReformIssueBrief.pdf [https://perma.cc/29YX-NL8X].

the compensatory, retributive, and deterrence gaps created by the current legal scheme.

Part I of this Note explains how tort law provides a viable alternative to criminal prosecutions in cases of sexual assault and the many benefits tort suits afford survivors as compared to the criminal process. Part I then explores how, despite these benefits, attorney fees pose a significant practical barrier to survivors who wish to bring these suits, given that many attorneys are hesitant to litigate these claims on a contingency fee basis.

In Part II, this Note presents comparative state docket and jury verdict data to suggest that tort reform statutes discourage attorneys from bringing sexual assault cases, thus barring many survivors with otherwise valid claims from pursuing civil recourse. Part II then draws on informal attorney interviews to demonstrate how state laws, including damage caps, influence attorney decisionmaking and litigation strategy in this field. The cumulative effect of these choices is that only certain types of sexual assault claims systematically reach state courts.

Part III proposes reforms that would enable plaintiffs to recover larger damage awards in tort, while recognizing the limitations of these proposals. Part III then advocates for the more aggressive use of criminal restitution in conjunction with existing tort suits to better achieve the justice system's overarching goals of victim compensation, offender accountability, and deterrence.

I. THE BENEFITS AND BARRIERS OF TORT LAW

This Part explores the benefits and challenges of using tort law as an alternative to the criminal process in cases of sexual assault. Section I.A describes tort law's application to sexual assault cases and the many benefits this regime affords survivors. Section I.B examines the challenges sexual assault survivors face in trying to bring these suits, focusing specifically on how the contingent fee system creates a significant practical barrier to securing legal representation. This Part concludes by framing the central questions of this Note: How might the contingent fee system lead attorneys to screen sexual assault cases? And furthermore, is this screening process congruent with the legal system's overarching retributive, compensatory, and deterrence goals?

A. Tort Law as an Alternative to Criminal Prosecutions

1. Tort Suits for Sexual Assault Are on the Rise

There has been an exponential increase in the number of sexual assault survivors who have filed tort suits in recent years, a trend that may be the product of both doctrinal innovations and changing social norms.[18] Plaintiffs in these suits may bring claims for assault, battery, false imprisonment, intentional infliction of emotional distress,[19] negligent infliction of emotional distress, invasion of privacy, and others.[20] In many cases, plaintiffs may also bring suits against institutional third parties for negligence in allowing or failing to prevent the assault.[21]

Tort law has enabled survivors of sexual assault to prevail in cases where prosecutors either decline to pursue criminal charges or do not obtain a conviction in criminal proceedings.[22] In both instances, plaintiffs have been able to leverage private law successfully to remedy public harms, thus effectuating a central purpose of the criminal law—exposing and punishing defendants for societal injuries—even when violations cannot be rectified in criminal courts.[23]

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18. Bublick, *Lessons for Courts*, *supra* note 14, at 59–61 (claiming that the recent increase in the number of tort suits is the product of a "broadening understanding of social responsibility for sexual assault prevention" and an increasing recognition of "third-party duties to use reasonable precaution . . . to prevent intentional torts").

19. Swan, *Triangulating Rape*, *supra* note 14, at 405–06.

20. Bublick, *Lessons for Courts*, *supra* note 14, at 71–72.

21. Swan, *Triangulating Rape*, *supra* note 14, at 405–06. Plaintiffs' theories of liability include the "negligent hiring of perpetrators, failure to maintain safe conditions on the premises at issue, and . . . knowing involvement by supervisors in the sexual abuse." Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1570 (2008). Courts will generally allow a plaintiff to attach a third-party defendant when a defendant: "1) has a special relationship with the plaintiff, 2) has a special relationship with the rapist, 3) has contributed to the dangerous situation in which the plaintiff is found, or 4) has volunteered to render assistance." Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1420–21 (1999) [hereinafter Bublick, *Citizen No-Duty Rules*]. The sexual assault must also be foreseeable, and thus a survivor will "need to show evidence of similar incidents in the area" in order to hold a third-party defendant liable. Leah M. Slyder, Note, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors*, 68 CASE W. RES. L. REV. 543, 570 (2017).

22. Bublick, *Lessons for Courts*, *supra* note 14, at 63–64.

23. Swan, *Triangulating Rape*, *supra* note 14, at 432.

2. The Benefits of Tort Law

In addition to remedying public harms, tort law affords survivors many personal benefits not found in the criminal law. For example, survivors may find tort law to be empowering.[24] Plaintiffs are represented by lawyers who must attend to their interests as clients and support them both inside and outside of the courtroom.[25] Survivors have agency to vindicate their rights and to drive the course of a suit, including making decisions as to "whether or not to testify, whom to call as a witness, what evidence to submit, [and] what remedy to seek."[26] Tort suits provide survivors with the opportunity to be heard as well as the opportunity to confront an attacker safely,[27] while giving them more direct influence over how these interactions will occur as compared to the criminal process.[28]

Tort suits also come with procedural benefits for survivors. For one, the burden of proof is lower in civil cases than in criminal proceedings.[29] In tort, plaintiffs need only prove their cases by a preponderance of the evidence; in criminal cases, by contrast, prosecutors must prove their cases beyond a reasonable doubt.[30] Furthermore, while prosecutors must provide highly specific and often graphic details about an assault in order to prove each element of an offense,[31] in a suit for battery, the plaintiff need only prove "(1) that the defendant touched the plaintiff; (2) that the defendant intended to touch the plaintiff; and (3) that the touching was conducted

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24. Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 964 (2009). This is not to say that all survivors will find tort suits empowering. *See* Bublick & Mindlin, *supra* note 16, at 4 (citing studies suggesting that some survivors experience anti-therapeutic consequences from filing suit). This is only to say that survivors who find civil recourse to be empowering should have the opportunity to sue.

25. Perry, *supra* note 24, at 972–75; *see* Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 278–79 (2005) (noting that, unlike civil lawyers, prosecutors must prioritize their professional responsibilities and ethical duties over a survivor's needs).

26. Perry, *supra* note 24, at 975–76, 979.

27. *Id.* at 982–83.

28. *Id.* at 980.

29. Anderson, *supra* note 7, at 235.

30. *Id.*

31. Corinne Casarino, Note, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. PUB. INT. L.J. 185, 186 (1996) (identifying the basic elements of a rape charge that prosecutors must prove in most jurisdictions).

in a harmful or offensive manner."[32] This lower threshold, both in terms of the burden of proof and the specificity of evidence required, can make it easier for plaintiffs to prevail in tort.[33]

Correspondingly, tort law grants defendants fewer procedural protections than they enjoy in the criminal context, given that there is no threat of incarceration.[34] Both parties have equal rights of discovery,[35] and unlike in criminal prosecutions, juries are permitted to make adverse inferences from a defendant's refusal to testify.[36] Plaintiffs can introduce evidence that may be disallowed in criminal proceedings, including some hearsay evidence and police reports, and survivors can more easily present evidence of trauma or post-traumatic stress disorder from the assault.[37]

Finally, tort law affords plaintiffs a wide range of potential remedies, including money damages.[38] These damages can help to alleviate physical or consequential economic harms resulting from the assault,[39] and compensation can provide emotional benefits by validating the survivor's experience.[40] In some cases, plaintiffs may choose to seek punitive damages, which not only can help to minimize the financial impact of the assault, but can serve larger deterrent and

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32. Anderson, *supra* note 7, at 236 (quoting *Ex parte* Atmore Cmty. Hosp., 719 So. 2d 1190, 1193 (Ala. 1998)).

33. Bublick, *Lessons for Courts*, *supra* note 14, at 72 (describing how, in contrast to criminal cases, survivors need not provide "insufferable details about exactly which digit touched which orifice" in tort). *See also* Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 980–81 (2016) [hereinafter Swan, *Between Title IX*] (explaining that, while in the criminal law survivors must prove that they affirmatively voiced non-consent, battery instead begins from the presumption that people have the right to be "free from unwanted physical contact").

34. Bublick, *Lessons for Courts*, *supra* note 14, at 69–70.

35. Swan, *Triangulating Rape*, *supra* note 14, at 424.

36. Anderson, *supra* note 7, at 236. Additionally, civil defendants can be found liable by a non-unanimous jury vote. Lininger, *supra* note 21, at 1577.

37. Lininger, *supra* note 21, at 1577–78.

38. Bublick, *Lessons for Courts*, *supra* note 14, at 73–74.

39. Lininger, *supra* note 21, at 1574 (noting that sexual assault survivors "bear tremendous costs, including medical bills, lost wages, and fees for professional services such as counseling"); Swan, *Triangulating Rape*, *supra* note 14, at 451 (identifying that "rape is second only to arson in terms of the cost per victimization" (quoting Jordan Matsudaira & Emily Greene Owens, *The Economics of Rape: Will Victims Pay for Police Involvement?* (May 20, 2009) (preliminary draft at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=
1407636 (on file with the *Columbia Human Rights Law Review*))).

40. Anderson, *supra* note 7, at 237.

retributive purposes as well.[41] Plaintiffs may also receive non-monetary remedies, such as an "apology or the assailant's transfer to a different university, apartment complex, or job."[42]

Given the viability of tort suits as an alternative to criminal prosecutions and the multitude of benefits this regime affords, the question remains why a greater proportion of survivors do not file tort suits for sexual assault. Although there are many reasons why a survivor might refrain from filing a civil action, the task of obtaining legal services may be an insurmountable hurdle for many who would otherwise bring suit.[43]

B. The Contingent Fee System and Its Challenges

Scholars have suggested many reasons why survivors might be hesitant to bring sexual assault cases in tort. These reasons include the length of trials, the lack of rape shield laws,[44] comparative fault defenses,[45] short statutes of limitations,[46] and the potential stigma that may attach to a survivor seeking financial compensation after an assault.[47] Scholars who address the issue, however, almost universally point to a lack of access to legal services as a significant or prohibitive hurdle.[48] Recognizing that survivors must navigate many priorities

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41. Swan, *Triangulating Rape*, *supra* note 14, at 428; Lininger, *supra* note 21, at 1574.

42. Bublick, *Lessons for Courts*, *supra* note 14, at 74.

43. *Id.* at 77 ("Perhaps the largest practical hurdle to direct litigation by the victim against the attacker is access to legal services.").

44. *Id.* at 76–77; Lininger, *supra* note 21, at 1578–79.

45. Swan, *Triangulating Rape*, *supra* note 14, at 447.

46. Slyder, *supra* note 21, at 575.

47. Lininger, *supra* note 21, at 1615 (noting that, in past suits, accusers have "endured a firestorm of criticism for their 'greedy' motives"); Bublick & Mindlin, *supra* note 16, at 6 ("[D]efense attorneys and media may . . . [try] to undermine the victim's credibility by portraying her as a person seeking financial gain from her accusations.").

48. Anderson, *supra* note 7, at 245 ("Civil lawsuits are frequently cost prohibitive where the victim has to bear the full cost of litigation, and because lawyers are unlikely to represent victims on a contingency fee basis unless there is a significant likelihood of recovery, rape victims have a particularly difficult time securing contingency fee representation."); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 543 (1992) (explaining that attorneys often decline to take tort cases for domestic violence because they "simply are unaware of the potential for significant monetary damages in these actions"); Kanter, *supra* note 25, at 281 (noting that the "reluctance of civil legal services attorneys to take on sexual assault cases may . . . be a function of their inexperience

and challenges in bringing a suit, this Section focuses specifically on the difficulties associated with obtaining legal representation and how the contingent fee system aggravates this difficulty.

1. Attorney Considerations in Evaluating Sexual Assault Cases

In 2000, Paul Strauss, a practicing attorney in Chicago, wrote an advisory piece outlining the standards he believes should be present before an attorney accepts *any* case on a contingency fee basis:

> [1] At the outset—without discovery—you recognize some kind of dramatic evidence that gives you a 70-percent or better chance of winning; [2] The plaintiff is someone you care about, respect, and can work with; [3] There are people who, when you call and talk to them, will vouch for the plaintiff and her character; [4] The plaintiff has both real and serious injuries (for these purposes, "real" and "serious" do not necessarily mean visible); [5] The plaintiff is a reasonable person—that is, if you listen to her, she will listen to you; [6] The plaintiff will seriously consider the risks of trial and the value of settlement; [7] The plaintiff is willing to work and can deal with the pressures of litigation and trial.[49]

Assuming that at least some attorneys use a method similar to Strauss's for evaluating cases,[50] it is striking how often these considerations will weigh against a survivor of sexual assault.[51] DNA evidence is often unavailable, and many cases turn on less technical corroborating evidence,[52] which may fall short of the "dramatic

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in dealing with criminal issues," especially given the difficulty of litigating these cases).

49. Paul Strauss, *Handling a Plaintiff's Sexual Harassment Case*, 26 LITIG. 35, 35–36 (2000).

50. Elizabeth Kuniholm, a founding partner at the Kuniholm Group, echoes many of Strauss's considerations in her advisory piece about how lawyers should evaluate sexual assault claims: "[M]easure the proof and potential proof against the difficulty of convincing a jury of liability and damages, as well as against the issue of collectibility [sic]. . . . credibility . . . is extremely important. . . . Assess the potential recovery for . . . damages, weighing all the 'bad facts.'" Elizabeth Kuniholm, *Representing the Victim of Sexual Assault and Abuse: Special Considerations and Issues*, Ann.2006 ATLA-CLE 1889.

51. *See infra* Section II.C.

52. Casarino, *supra* note 31, at 197 (identifying that many sexual assault cases "boil down to a question of the rapist's word against the victim's"); Allison Leotta, *I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth*,

evidence" threshold for many lawyers.[53] Anticipated defenses of consent[54] or comparative fault[55] can further undermine claimants' cases in the eyes of an attorney.

Attorneys may also perceive a tendency amongst jurors to blame the victim in sexual assault cases,[56] thus potentially leading lawyers to consider survivors of "respectable" character only when they are unimpeachable.[57] In investigating a potential plaintiff's character, lawyers may find information about past relationships or activities that, although irrelevant or inconsequential to the case at hand,[58] they assume will prove devastating to their case.[59]

TIME (Oct. 3, 2018), http://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/ [https://perma.cc/4FD5-EBZ2] (explaining that, in many cases, "DNA is often unavailable. So we look to . . . eyewitnesses at the bar or party in question. We pull video surveillance, doctors' reports, text messages, phone calls, social media posts, memoirs, calendars and yearbooks.").

53. Strauss, *supra* note 49, at 35.

54. Bublick, *Citizen No-Duty Rules*, *supra* note 21, at 1414 (explaining that, in many civil cases, jurors still insist that survivors "physically resist their assailants" in order to award recovery); Bublick, *Lessons for Courts*, *supra* note 14, at 80 ("[I]f the defendant himself actually but unreasonably believed that the plaintiff was consenting, many though not all state courts would not hold the defendant liable in tort.").

55. Slyder, *supra* note 21, at 567–68; Kuniholm, *supra* note 50 (explaining how issues of contributory negligence and comparative fault can arise in sexual abuse cases).

56. Lininger, *supra* note 21, at 1634 (noting that "psychologists and legal experts have identified the susceptibility of jurors to prejudice against accusers in rape cases"); Kanter, *supra* note 25, at 268 (explaining that in sexual assault cases, "the focus remains on the victim and her behavior, and her sexuality is a weapon to be used against her").

57. Kuniholm, *supra* note 50 (claiming jurors are less likely to believe a survivor who has turned to drugs or alcohol after an assault, and even unimpeachable plaintiffs may have self-protection concerns that undermine their credibility). *See also* Terrence Lavin, *Keeping the Dog at Bay*, 17 LITIG. 36, 38 (1991) (advising fellow attorneys that "[j]uries compensate people who appear worthy of compensation . . . . The character and integrity of the plaintiff are of paramount importance to a jury."). For a discussion of how race, class, gender, and other factors affect perceptions of a survivor's credibility, *see* Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office*, 16 L. & SOC'Y REV. 225, 229–37 (1981–1982).

58. Anderson, *supra* note 7, at 232; Shen, *supra* note 15, at 13–14.

59. Kuniholm, *supra* note 50 (warning attorneys that survivors' past social, family, legal, medical, or psychiatric histories might be used as a weapon against them at trial).

In addition, it can be difficult in sexual assault cases to prove the character and extent of a survivor's injuries.[60] While in some cases a survivor may demonstrate traditional injuries associated with emotional distress, in many cases the trauma associated with a sexual assault is less visible,[61] and a plaintiff's testimony may be the only evidence of the resulting injury.[62] In these cases, lawyers may question whether they can convince a jury that these injuries are in fact "real."[63]

Furthermore, some sexual assault survivors may be unwilling to "seriously consider . . . the value of settlement."[64] Many survivors file tort suits specifically because they want to have the opportunity to tell their side of the story and have their claims heard in court.[65] If lawyers perceive that this is a primary motivation for a potential plaintiff, they may doubt the survivor's willingness to accept a private settlement no matter how favorable the terms.[66]

Finally, lawyers may presume that a civil suit will pose psychological difficulties for a survivor.[67] Some plaintiffs have experienced severe stress during trial, which has left many "unwilling

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60. Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479, 488 (1979).

61. *Id.* at 488–90 (detailing the traditional psychological dysfunctions associated with emotional distress and contrasting these with the trauma typically suffered by sexual assault survivors); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1278 (2004) (stating that jurors perceive emotional injuries to be "less real and less tangible, because they are not physically verifiable").

62. LeGrand & Leonard, *supra* note 60, at 489.

63. Shen, *supra* note 15, at 35.

64. Strauss, *supra* note 49, at 36.

65. Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 U. KAN. L. REV. 695, 743 (2014) ("Tort suits provide litigants with an opportunity to articulate their harms and have their experiences validated."); Hannah Brenner & Kathleen Darcy, *Toward a Civilized System of Justice: Re-Conceptualizing the Response to Sexual Violence in Higher Education*, 102 CORNELL L. REV. ONLINE 127, 158 (2017) (describing how tort law provides a public forum where survivors can tell their stories, have their voices heard, and have their needs recognized).

66. Anderson, *supra* note 7, at 229 (explaining that, for many survivors, publicly naming their attackers and receiving "validation from bystanders" is a key goal); Shen, *supra* note 15, at 38 (quoting a lawyer who frequently litigates civil sexual assault cases as stating: "Every single client that comes into my office says, 'This isn't about the money'.").

67. LeGrand & Leonard, *supra* note 60, at 483; Kanter, *supra* note 25, at 259–60 (explaining that litigation is "an extended, emotionally draining experience that, more often than not, re-victimizes the rape survivor").

or unable to participate further in the legal system."[68] Lawyers may refuse to take sexual assault cases on the assumption that survivors will struggle to cope with the pressures of litigation, or they may anticipate that these plaintiffs will require more time and emotional support than a typical client.[69]

2. Specific Challenges Presented by Damage Awards in Sexual Assault Cases

Specific challenges associated with securing damage awards may further discourage attorneys from accepting sexual assault cases on a contingency fee basis. Jury verdicts in these cases are notoriously unpredictable and difficult to value.[70] Furthermore, in many cases assailants lack assets sufficient to satisfy the monetary judgments against them,[71] and several states have adopted statutes capping damage awards in personal injury cases.[72]

Professor Lucinda Finley has examined how tort reform statutes establishing caps on noneconomic damages have a discriminatory impact on women. She describes how "juries consistently award women more in noneconomic loss damages than men, and . . . the noneconomic portion of women's total damage awards is significantly greater than the percentage of men's tort recoveries attributable to noneconomic damages."[73] Finley notes that noneconomic damage caps are particularly problematic in cases of sexual assault, where women receive noneconomic damages almost

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68. LeGrand & Leonard, *supra* note 60, at 482. According to LeGrand and Leonard, many plaintiffs report that trial "is one of the most trying experiences of their lives" and some even report that "their experience with the criminal justice system was worse than the sexual assault itself." *Id.* at 481.

69. Kanter, *supra* note 25, at 280–82.

70. Slyder, *supra* note 21, at 576; LeGrand & Leonard, *supra* note 60, at 485.

71. Slyder, *supra* note 21, at 576; Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 736 (2012); Shen, *supra* note 15, at 32. It is important to note, however, that assailants can be found across all sectors of society, and thus it is likely that there are a substantial number of potential defendants able to satisfy monetary judgments against them. LeGrand & Leonard, *supra* note 60, at 484.

72. Slyder, *supra* note 21, at 577; Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries, and Social Policy*, 38 LOY. L.A. L. REV. 1217, 1261 (2005) (explaining that caps generally reduce the amount recovered by plaintiffs, which can affect their ability to find an attorney willing to take their case).

73. Finley, *supra* note 61, at 1266.

exclusively.[74] Consequently, attorneys in states that have capped noneconomic damages may be more reluctant to accept sexual assault cases,[75] thus preventing women from achieving equal access to justice in certain states and contexts.

3. The Implications of Attorney Screening in Sexual Assault Cases

In civil cases, contingency fee lawyers play a de facto gatekeeping role in access to the courts.[76] According to the traditional narrative embraced by Strauss and others, lawyers evaluate claims to determine the risks and rewards associated with each suit in an effort to identify cases that have the potential to generate a substantial fee.[77] This can lead lawyers to reject cases that are unlikely to result in large damages, regardless of the egregiousness of the assailant's conduct or the validity of the plaintiff's claim.[78]

Although there has been relatively little research regarding attorney case selection, existing data suggest that plaintiff-side

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74. *Id.* Finley's analysis of tort suits in Florida reveals that, "noneconomic loss damages are a much higher proportion of total compensatory tort awards for sexual assault victims than for tort awards overall. Sexual assault victims are overwhelmingly female, and female plaintiffs noneconomic loss damages comprise virtually the entire award—91.6%." *Id.* at 1301.

75. *See* Swedloff, *supra* note 71, at 738 (describing how attorneys must consider the amount they will be able to collect from a judgment before accepting a client); *see also* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1190 (1992) (explaining that tort lawyers often turn away potential plaintiffs with actionable injuries because lawyers do not believe these cases will be profitable).

76. Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 22 (1997). Relatively few plaintiffs are able to afford the cost of representation without contingency fee arrangements. *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 73–74 (1999) (identifying that attorneys may require significant deposits or bill up to $150 per hour when not working on a contingency basis).

77. Kritzer, *supra* note 76, at 22–23.

78. Finley, *supra* note 61, at 1279 ("Lawyers are also less willing to bring suits acknowledged to be meritorious unless they cross a certain threshold of economic loss damages, no matter how devastating the injury and how compelling the proof . . . ."); Vidmar, *supra* note 72, at 1233 ("Because lawyers working on a contingency fee basis have their own time and money at stake, they tend to carefully screen cases and weed out those that have minor injuries, low damages potential, or a low potential of winning at trial."); Saks, *supra* note 75, at 1195–96 (explaining that the contingent fee system may prevent meritorious claims from being filed).

attorneys turn away a high percentage of cases.[79] Scholars have posited that attorneys turn away cases with unsympathetic plaintiffs, ambiguous evidence, complex legal questions, and/or cases where the expected award will be less than three times the lawyer's anticipated fee.[80]

This type of screening may have troubling practical and doctrinal consequences. Within this framework, only comparatively strong, high-yield cases will make it into court,[81] conceivably leading to case law and tort doctrine inapplicable to many instances of sexual assault that society would still like to deter.[82] Additionally, certain classes of defendants may be judgment-proof (insulated from liability due to their inability to satisfy damage awards),[83] which in practical terms may mean that only certain survivors have the ability to pursue legal recourse for their assaults.

Anecdotal data suggest that contingency fee lawyers weigh the predicted costs of a suit against the likelihood and magnitude of monetary return in determining whether to accept a case.[84] Some commentators have gone so far as to claim that the financial incentives of plaintiffs' lawyers, rather than legal doctrine or the financial incentives of clients, drive the frequency and outcomes of tort litigation.[85] Thus, as many scholars have noted,[86] it is nearly self-evident that the contingent fee system leads attorneys to screen out

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79. Saks, *supra* note 75, at 1190.

80. *Id.* at 1191.

81. *Id.* at 1191–92.

82. Finley, *supra* note 61, at 1266 (explaining that many "priceless aspects of life hold little economic worth in the market," and suggesting that if related harms are not sufficiently profitable these cases will not be litigated). Relatedly, there is little evidence to suggest that lawyers are particularly skilled at valuing cases ex ante in an accurate way. Saks, *supra* note 75, at 1222–23.

83. Saks, *supra* note 75, at 1192–93. Tom Lininger suggests that, as more and more plaintiffs file tort suits for sexual assault, rich defendants may increasingly be able to escape criminal liability and thus will benefit disproportionately from the rise of civil lawsuits. He writes that this trend "could create a class-bifurcated system in which rich defendants pay for rape while poor defendants serve time." Lininger, *supra* note 21, at 1565.

84. Morgan, *supra* note 76, at 81–82, 85 (explaining how contingency fee lawyers may delegate tasks to clients, and still may reject cases when the potential damage award is too low to warrant representation).

85. Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1757, 1759–60 (1993).

86. *See supra* note 78.

sexual assault claims that are unlikely to yield substantial damage awards.

Evidence also suggests, however, that the attorney screening process is more complex than a simple risk-return formula.[87] For example, Mary Nell Trautner, a sociology professor at the University of Buffalo, argues that previous research focusing only on how attorneys evaluate monetary risks "obscures how legal environments and local cultures also shape the decisions that lawyers make."[88] In interviewing lawyers from states that have passed extensive tort reform statutes and states that are traditionally more plaintiff-friendly, Trautner found that non-monetary considerations played a significant role in attorney case selection in both contexts.[89] While lawyers in reform states focused on their ability to prove a defendant's liability as a central concern, lawyers in non-reform states instead focused primarily on whether they believed a potential client would be "likeable" in the eyes of a jury.[90]

Trautner's analysis reveals that attorney screening decisions vary not only based on financial considerations, but based on social and contextual considerations as well.[91] While the potential for significant damages is an important factor in this process, empirical data are also necessary to validate intuitions about the attorney screening process, and to ascertain the larger doctrinal impacts of screening decisions.[92]

II. STATE COMPARATIVE ANALYSIS

This Part analyzes quantitative data and draws on informal interviews with attorneys to determine how statutes limiting damage

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87. *See* Mary Nell Trautner, *Tort Reform and Access to Justice: How Legal Environments Shape Lawyers' Case Selection*, 34 QUALITATIVE SOC. 523 (2011).

88. *Id.* at 524.

89. Trautner characterized Colorado and Texas as reform states on the basis that these states lead the nation in the number of tort reforms passed and have "experienced heavy media campaigns in support of tort reform." *Id.* at 526. Trautner likewise characterized Massachusetts and Pennsylvania as non-reform states on the basis that they "are considered by both plaintiff and defense attorneys to be more friendly toward plaintiffs than to corporations." *Id.* at 527.

90. *Id.* at 528–30. Trautner notes how likeability might be tied to "status characteristics like race, social class, appearance, and employment status." She quotes a Texas lawyer as stating: "I find that generally, the prettier and whiter my clients are, the less likely their case goes to trial. . . . Same thing [with awards], the more sophisticated, prettier you are, higher value." *Id.* at 529.

91. *Id.* at 534.

92. *Id.*

awards may influence the attorney screening of sexual assault claims in tort. Section II.A explains how states were selected and categorized as either "tort reform" or "non-reform" states. Section II.B compares the estimated number of tort suits filed in tort reform versus non-reform states in the year following #MeToo, as well as jury verdict data from the last decade. Section II.C examines trends from attorney interviews to draw conclusions about how state laws affect attorney decisionmaking and strategy in practice and, as a result, how tort reform statutes may deter attorneys from litigating certain types of sexual assault claims.

A. Selecting and Categorizing States

The following analysis distinguishes between states that have enacted punitive and noneconomic damage caps ("tort reform" states) and those which have not done so ("non-reform" states). The subsequent Sections focus on Alaska,[93] Colorado,[94] Idaho,[95] Kansas,[96]

93. Alaska law states that noneconomic damages "may not exceed $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater." ALASKA STAT. § 09.17.010 (2018). Alaska Law also caps punitive damages at the greater of $500,000 or three times compensatory damages. ALASKA STAT. § 09.17.020(f) (2018).

94. Colorado law states that noneconomic damages shall not exceed $500,000. COLO. REV. STAT. § 13-21-102.5(3)(a) (2018). Punitive damages are typically restricted to the amount of compensatory damages, but may be increased up to three times compensatory damages if it is shown that the defendant acted in a willful and wanton manner. COLO. REV. STAT. § 13-21-102(1)(a), (3)(a)–(b) (2018).

95. Idaho law states that noneconomic damages shall not exceed $250,000. IDAHO CODE § 6-1603(1) (2018). The law also provides that punitive damages shall not "exceed the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages . . ." IDAHO CODE § 6-1604(3) (2018).

96. Kansas law states that pain and suffering damages "shall not exceed a sum total of $250,000." KAN. STAT. ANN. § 60-19a01(b) (2018). Punitive damages may not "exceed the lesser of: (1) The annual gross income earned by the defendant . . . or (2) $5 million." KAN. STAT. ANN. § 60-3701(e) (2018).

Mississippi,[97] Ohio,[98] Oklahoma,[99] and Tennessee[100] as "tort reform" states, as these are the only states that cap both noneconomic[101] and punitive damages[102] in personal injury cases. These Sections similarly

97. Mississippi law states that a jury may not award "more than One Million Dollars ($1,000,000.00) for noneconomic damages." MISS. CODE. ANN. § 11-1-60(2)(b) (2018). Punitive damage caps vary based on the net worth of the defendant. MISS. CODE. ANN. § 11-1-65(3)(a) (2018).

98. Ohio law states that noneconomic damages "shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss" up to $350,000. OHIO REV. CODE ANN. § 2315.18(B)(2) (West 2018). Punitive damages shall not exceed "the lesser of two times the amount of the compensatory damages awarded . . . or ten percent of the employer's or individual's net worth" up to $350,000. OHIO REV. CODE ANN. § 2315.21(D)(2)(b) (West 2018).

99. Oklahoma law states that awards for "noneconomic loss shall not exceed Three Hundred Fifty Thousand Dollars ($350,000.00)" unless a plaintiff can prove that a defendant acted fraudulently or with recklessness, gross negligence, intent, or malice. OKLA. STAT. tit. 23, § 61.2(B)–(C) (2018). Oklahoma has a tiered system for capping punitive damages based on the egregiousness of the defendant's conduct. OKLA. STAT. tit. 23, § 9.1(B)–(D) (2018).

100. Tennessee law states that noneconomic damages shall not "exceed seven hundred fifty thousand dollars ($750,000) for all injuries and occurrences." TENN. CODE ANN. § 29-39-102(a)(2) (2018). Punitive damages may not exceed the greater of two times compensatory damages or $500,000. TENN. CODE ANN. § 29-39-104(a)(5) (2018).

101. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, CTR. FOR DEMOCRACY N.Y. LAW SCH. (June 22, 2017), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary (last visited Jan. 3, 2019) (on file with the *Columbia Human Rights Law Review*) (identifying Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, Ohio, Oklahoma, Oregon, and Tennessee as capping noneconomic damages in personal injury cases). Since the time of writing, the Kansas and Oklahoma Supreme Courts have declared non-economic damage caps unconstitutional. *See* Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019); Beason v. I. E. Miller Servs., Inc., 2019 OK 28, ¶ 1, 441 P.3d 1107, 1109. Further research is necessary to determine how these decisions will influence the number of sexual assault cases filed in each state in the coming years.

102. Hawaii, Maryland, and Oregon have not passed relevant statutory caps on punitive damages. *See* Kang v. Harrington, 587 P.2d 285, 292 (Haw. 1978) (concluding that jury awards are only excessive when they are "not supported by the evidence" or are "outrageous"); Bowden v. Caldor, Inc., 710 A.2d 267, 277 (Md. 1998) (stating the punitive damage awards cannot be "grossly excessive"); Goddard v. Farmers Ins. Co. of Oregon, 179 P.3d 645, 670 (Or. 2008) (concluding that punitive damage caps only apply in cases of purely economic harm).

focus on California,[103] Florida,[104] Illinois,[105] and New York[106] as representative "non-reform" states.

These states were selected based on the American Tort Reform Foundation's rankings of "Judicial Hellholes" from the past five years: states perceived to be plaintiff-friendly in the likelihood of plaintiff victory and size of damage awards.[107] California, Florida, Illinois, and New York were the four states consistently ranked as "hellholes" from 2013–2018.[108]

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103. California does not cap noneconomic damages in personal injury cases. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, *supra* note 101. California requires that a punitive damages "award bear a reasonable relationship to the award of compensatory damages or the injury sustained." Douglas v. Ostermeier, 2 Cal. Rptr. 2d 594, 606 (1991).

104. Florida law states that punitive awards may not exceed the greater of $500,000 or three times compensatory damages. FLA. STAT. § 768.73(1)(a)–(d) (2018). This cap does not apply if the jury determines that "the defendant had a specific intent to harm the claimant and . . . the defendant's conduct did in fact harm the claimant." *Id.* In June 2017, the Florida Supreme Court held that noneconomic damage caps are unconstitutional. N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).

105. Illinois does not cap noneconomic damages in personal injury cases. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, *supra* note 101. Punitive damages are not limited by the amount of compensatory damages awarded. Loitz v. Remington Arms Co., 563 N.E.2d 397, 402 (Ill. 1990).

106. New York does not cap noneconomic damages in personal injury cases. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, *supra* note 101. Punitive damages need not be proportional to compensatory damages. Merritt v. Ramos, 639 N.Y.S.2d 643, 645 (N.Y. Civ. Ct. 1995).

107. *Judicial Hellholes: Report Archives*, AM. TORT REFORM FOUND., http://www.judicialhellholes.org/archives/ [https://perma.cc/9TGK-MYHS] (cataloguing the American Tort Reform Foundation's rankings of judicial hellholes from 2013–2014 to 2017–2018).

108. Louisiana was the only other state consistently ranked as a "Judicial Hellhole" from 2013–2018. However, Louisiana has been excluded as a representative non-reform state for the purposes of this analysis given that Louisiana appellate courts may reduce or overturn jury damage awards per the state's civil law tradition. Study, *Louisiana Personal Injury Awards*, 52 LOY. L. REV. 957, 958–59 (2006); Benjamin D. Jones, *Conflicting Results: The Debate in Louisiana Courts over the Proper Method of Appellate Review for the Inconsistent Verdicts of Bifurcated Trials*, 56 LOY. L. REV. 995, 998 (2010). This legal distinction is likely to influence how plaintiff-side lawyers value tort suits, given the potential additional burdens of defending a jury award on appeal. In addition, Bloomberg Law only maintains up to date docket coverage for one of Louisiana's forty-two judicial districts. *See Docket Coverage*, BLOOMBERG LAW, https://www.bloomberglaw.com/dockets/coverage/detail (last visited Jan. 3, 2019) (on file with the *Columbia Human Rights Law Review*).

B. State Comparative Data

1. State Court Docket Data from the Year Following #MeToo

In light of the #MeToo movement, survivors may be more willing than ever to take legal action against their assailants.[109] Comparative data regarding the number of suits filed during this period may therefore serve as a possible indicator of the relative barriers survivors face in accessing the tort system. Using state court dockets as a proxy,[110] this Section compares the number of tort cases for sexual assault filed in each state in the year following #MeToo, with Alyssa Milano's tweet serving as the approximate start date of the #MeToo movement.[111] These data were collected from the Bloomberg Law Docket Database using the search term "sexual assault" over the period from October 15, 2017 to October 15, 2018.[112] The resulting dockets were reviewed individually to identify plaintiffs bringing tort causes of action.

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109. *See supra* note 13.

110. State court dockets are an admittedly incomplete and imperfect source of data about the number of cases filed in state courts in a given period. Online search records are unlikely to be fully comprehensive due to the volume of dockets filed in state courts, and not all state courts opt to upload their dockets to an online database. Furthermore, not all state court docket filings are fully text-searchable. Given these limitations, these data are intended to serve as a rough proxy for current trends in conjunction with other data presented in this Section.

111. Milano, *supra* note 2.

112. *Docket Coverage*, *supra* note 108. It was not feasible to use alternative sources of state docket data due to the scope of this Note and the complexity of gaining access to these sources.

Table 1: State Court Docket Data from the Year Following #MeToo							
State	Punitive Damage Cap[113]	Noneconomic Damage Cap[114]	Est. % of U.S. Pop. in 2018[115]	Rapes per 100,000 inhabitants in 2017[116]	Dockets Filed 10/15/17 – 10/15/18[117]	% of Trial Courts Covered [118]	Est. % of State Pop. Covered[119]
REFORM STATES							

113. *See supra* notes 93–106.

114. *See supra* notes 93–106.

115. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU (Jan. 3, 2019), https://www.census.gov/data/datasets/time-series/demo/popest/2010s-national-total.html [https://perma.cc/GUQ7-2Q2B].

116. *2017 Crime in the United States by Region, Geographic Division, and State, 2016–2017*, FBI CRIMINAL JUSTICE INFO. SERV. DIV., https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-4 [https://perma.cc/PA3P-ZQKH].

117. *See supra* text accompanying notes 111–112.

118. The Bloomberg Law docket database pulls records from: all four of Alaska judicial districts, thirty of California's fifty-eight superior courts, sixteen of Florida's sixty-seven county courts, eleven of Illinois's twenty-four circuit courts, sixty of New York's sixty-two supreme courts, twenty-three of Ohio's eighty-eight county courts, and sixty-eight of Oklahoma's seventy-seven district courts. A state court, district court, circuit court, or county court was determined to be "covered" when Bloomberg asserted coverage within the specified date range. *See Docket Coverage*, *supra* note 108.

119. Estimated population data for each county "covered" in Bloomberg Law's docket search was analyzed in light of the 2017 estimated state population totals, given county by county estimates were not yet available for 2018 at the time of writing. *County Population Totals and Components of Change: 2010-2017*, U.S. CENSUS BUREAU (Mar. 22, 2018), https://www2.census.gov/programs-surveys/popest/datasets/2010-2017/counties/totals/ [https://perma.cc/HZX7-HFQB]. The Alaska estimated data is based on individuals living in boroughs, cities, or municipalities, as these individuals are the most able to access the state court system.

AK	$500,000 or 3x compens.	$400,000 or life expectancy x $8,000	.23%	116.7	0	100%[120]	90%
OK	$500,000 or 2x compens.	$350,000	1.21%	54.5	<5	88%	95%
OH	$350,000 or 2x compens.	$350,000	3.57%	50.3	<5	26%	53%
NON-REFORM STATES							
CA	None	None	12.09%	37.2	225+	52%	93%
FL	$500,000 or 3x compens.	None	6.51%	37.8	25+	24%	63%
IL	None	None	3.89%	43.4	50+	46%	68%
NY	None	None	5.97%	31.9	50+	97%	99%

120. This table does not include data regarding suits that have been filed in Alaska's district courts of limited jurisdiction or tribal courts. For a discussion of the complex jurisdictional challenges involved in prosecuting rapes committed in tribal jurisdictions, *see* Jasmine Owens, *"Historic" in A Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims*, 102 J. CRIM. L. & CRIMINOLOGY 497 (2012). Public Law 280 grants the State of Alaska jurisdiction over civil matters occurring on reservations, thus allowing Alaska Native women to pursue tort actions in state court. Susanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?*, 10 ALASKA L. REV. 335, 347 (1993). However, Alaska Native women face many challenges when litigating in state court, including distance, discrimination, language barriers, and unrepresentative juries. Owens, *supra*, at 512–13.

Although these figures are only a rough estimate of the number of suits filed since the start of the #MeToo movement, the data suggest a clear trend—plaintiffs filed substantially more tort suits for sexual assault in states without punitive and noneconomic damage caps. This trend is particularly salient when one compares Ohio and Illinois. Both are located in the Midwest and contain roughly 4% of the total U.S. population,[121] and the two states varied by fewer than ten rapes per 100,000 inhabitants in 2017.[122] However, more than fifty plaintiffs filed tort suits for sexual assault in Illinois in the year following #MeToo, while fewer than five did so in Ohio. If one uses these estimates to predict the number of suits which would have been filed in each state had both states been subject to 100% docket coverage, there would still be more than five times as many suits filed in Illinois.[123] This suggests that tort reform statutes in Ohio may discourage lawyers from accepting and litigating these claims.

The Alaska data are also noteworthy. Alaska is an extreme outlier in terms of the number of rapes per capita, with almost three times as many rapes as compared to the United States as a whole.[124] In the year following #MeToo, at least twenty Alaskan plaintiffs filed suits seeking civil protection orders against defendants who had sexually assaulted them; none of these named plaintiffs, however, filed tort suits seeking damages for personal injury.[125] Sexual assault is an

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121. *See supra* note 115.

122. Ohio reported about seven more rapes per 100,000 inhabitants than Illinois in 2017. *2017 Crime in the United States by Region, Geographic Division, and State, 2016–2017*, *supra* note 116.

123. If one adjusts the data to reflect 100% population coverage in each state, there would have been roughly ten suits filed in Ohio as compared to about seventy-five suits in Illinois during this period, or seven times as many suits in Illinois. If one adjusts the data to reflect 100% trial court coverage, there would have been roughly twenty suits filed in Ohio as compared to more than 100 suits in Illinois during this period, or five times as many suits in Illinois.

124. The FBI reports that there were 41.7 rapes per 100,000 inhabitants in the United States in 2017. *2017 Crime in the United States by Region, Geographic Division, and State, 2016–2017*, *supra* note 116. The states with the next highest rates of rape per 100,000 inhabitants were: Michigan (70.6), Colorado (68.8), South Dakota (68.4), and Arkansas (68.3).

125. *See supra* note 117. The American Bar Association reports that there were 2,311 practicing attorneys in Alaska in 2018. Alaska had more active attorneys than states of comparable population size during this period: South Dakota (1,995), North Dakota (1,694), Vermont (2,227), and Wyoming (1,716). *National Lawyer Population by State 2009-2019, Legal Profession Statistics*, AM. BAR ASS'N (Dec. 31, 2018), https://www.americanbar.org/about_the_aba/profession_statistics/ [https://perma.cc/FLN6-BFFG]. Based on these statistics, there does not seem to be a significant shortage of attorneys in Alaska, which might

extremely pressing problem in Alaska.[126] Therefore, state laws or structures that preclude tort claims for these harms are likely to be considered normatively undesirable, given tort law's potential to deter these offenses.[127]

It is also worth noting how California is a positive outlier in this regard. Despite having comparable damage laws and rates of rape to the other non-reform states, plaintiffs in California filed considerably more tort suits for sexual assault in the year following #MeToo, even when one accounts for differences in state population size and docket coverage.[128] This suggests that there may be something specific to the legal context of California—including shared "interpretation[s], expectations, social norms, and attitudes"[129]—that leads attorneys to bring tort suits for sexual assault.[130]

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constitute an additional barrier for survivors seeking representation in civil proceedings.

126. *See* Casey Grove, *In Alaska, 'Righteous Rage' Over Sexual Assault*, NPR (Oct. 2, 2018), https://www.npr.org/2018/10/02/652825497/in-alaska-righteous-rage-over-sexual-assault [https://perma.cc/Q2E3-JBA7]; Sara Bernard, *Rape Culture in the Alaskan Wilderness*, ATLANTIC (Sept. 11, 2014), https://www.theatlantic.com/health/archive/2014/09/rape-culture-in-the-alaskan-wilderness/379976/ [https://perma.cc/Q2E3-JBA7].

127. Katherine Florey additionally suggests that extending tribal courts' civil jurisdiction to non-members may help to curb sexual assaults in Alaska, given that a substantial number of sexual assaults on tribe members are committed by non-members. Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1503–04 (2013).

128. About forty of the California dockets were filed in connection with sexual assaults by former University of Southern California gynecologist, George Tyndall. *See* Stephanie Elam & Jack Hannah, *93 More Ex-students Accuse Former USC Gynecologist of Sexual Misconduct, Attorney Says*, CNN (Oct. 18, 2018), https://www.cnn.com/2018/10/18/us/usc-gynecologist-george-tyndall-new-accusers/index.html [https://perma.cc/C2Z4-MSZN] (detailing the many allegations of abuse against Tyndall). The possibility that the university will be liable for punitive damages in these suits may make these cases especially attractive to plaintiff-side attorneys.

129. Trautner, *supra* note 87, at 525.

130. California attorney Steven Sweat suggests that this trend may be due to the perception that jury instructions are interpreted more liberally in California than in other jurisdictions. Telephone Interview with Stephen Sweat, Principal Attorney (Jan. 11, 2019). *See* Steven Sweat, *Sexual Assault and Battery Claims in California*, https://www.victimslawyer.com/sexual-assault-and-battery-claims-in-california.html [https://perma.cc/VSX6-YJJF] (explaining the definition of sexual battery under California law and legal remedies for survivors).

2. State Jury Verdict Data and Damage Awards from 2008–2018

State docket data from the year following #MeToo suggest that plaintiffs and attorneys are more likely to file tort suits for sexual assault in states that allow for greater damage awards. To that end, it is instructive to examine jury verdict data from the last decade to determine the extent to which awards in non-reform states exceed those in reform states. This table summarizes jury verdict awards in tort cases for sexual assault from 2008–2018:

Table 2: Plaintiff Tort Awards in Sexual Assault Cases from 2008–2018[131]										
State	Est. % of U.S. Pop. in 2018[132]	Suits with Plaintiff Verdicts	Average Award	Median Award	Suits with Pain & Suffering Damages	Average Award	Median Award	Suits with Punitive Damages	Average Award	Median Award
REFORM STATES										
CO	1.74%	2	$1,992,426	$1,992,426	0			0		
MS	0.91%	5	$338,778	$125,000	0			0		
OH	3.57%	12	$1,054,566	$408,296	3	$1,703,333	$500,000	2	$320,000	$320,000
TN	2.07%	1	$151,300	$151,300	1	$151,300	$151,300	1	$151,300	$151,300
NON-REFORM STATES										
CA	12.09%	65	$8,792,275	$1,593,185	37	$9,198,465	$1,494,574	17	$10,186,791	$1,400,000
FL	6.51%	44	$31,571,783	$4,643,000	30	$31,604,376	$5,225,000	8	$106,514,863	$100,650,000
IL	3.89%	9	$7,156,667	$3,650,000	5	$5,557,000	$3,650,000	4	$9,190,000	$4,325,000
NY	5.97%	19	$4,902,895	$500,000	11	$8,235,455	$2,500,000	2	$7,957,500	$7,957,500

131. These data were collected from the Lexis Advance Verdict & Settlement Analyzer using the search term "sexual assault" and the filter "torts" over the period from 01/01/2008–12/31/2018. *Verdict & Settlement Analyzer*, LEXIS ADVANCE, https://advance.lexis.com/vsahome/ (last visited Jan. 3, 2019).

132. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018*, *supra* note 115.

Although jury verdict data for each state are admittedly limited, these figures are informative to the extent that practicing attorneys rely on similar data sets or search tools in valuing suits and determining their likelihood of success. While these data only roughly approximate overarching trends in jury awards over the last decade, they shed light on how lawyers working on a contingency fee basis might determine whether to accept a particular case based on a predicted damage award range.

Damage awards from the last decade reveal that plaintiffs obtain favorable verdicts more frequently in states with higher overall awards. The average award in non-reform states is about fifteen times the average award in reform states; the median award in non-reform states is almost four times greater.[133] Correspondingly, there were about seven times as many favorable plaintiff verdicts in non-reform states, despite being less than three-and-a-half times more populous. These data add further support to the conclusion that attorneys are more willing to accept and litigate viable sexual assault claims in states that allow for larger potential damage awards.

This trend is particularly noticeable when one compares historical damages data from New York and Florida. Both states contain roughly 6% to 7% of the population, but Florida yielded more than twice as many favorable plaintiff verdicts in sexual assault cases over the relevant time period. Although juries awarded pain and suffering and punitive damages with roughly the same frequency in both states,[134] the median award in Florida is more than nine times greater than the median award in New York, and median pain and suffering damages are roughly twice as high. Additionally, the data reveal the potential for extremely high punitive damages in Florida,[135]

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133. *See supra* Table 2.

134. Pain and suffering damages were awarded in 68% of suits with plaintiff verdicts in Florida and in 58% of suits with plaintiff verdicts in New York. Punitive damages were awarded in 18% of suits with plaintiff verdicts in Florida and in 11% of suits with plaintiff verdicts in New York. *See supra* Table 2.

135. Juries awarded outsized punitive damage awards even in cases where the plaintiff named the assailant as the sole defendant. In two instances, the jury awarded $90,000,000 in exemplary damages against a sole defendant accused of sexual assault. *See* Jury Verdict, John Doe No. 69 v. Father Michael J. Doherty, No. 11-10989 CA 05, 2011 Jury Verdicts LEXIS 199652 (Nov. 10, 2011); Jury Verdict, Andres Susana vs. Neil J. Doherty, No. 2011-10986-CA-01, 2012 FL Jury Verdicts Review LEXIS 1 (Nov. 11, 2011). Additionally, there was one instance in which a plaintiff sued an assailant directly, and the jury awarded $400,000 in punitive damages. *See* Jury Verdict, V.C., a minor, by and through her mother and natural

which may lead to a greater willingness amongst attorneys to litigate cases if they suspect the jury might consider granting a punitive award.

C. Attorney Interviews

State court docket data from the year following #MeToo and jury verdict data over the past ten years indicate that more plaintiffs litigate tort claims for sexual assault in states that allow for larger damage awards. Despite the limitations of this data set, these figures suggest that access to legal representation is a significant if not principal factor affecting the number of suits brought, and that contingent fee considerations may lead attorneys to engage in a screening process that filters out certain types of otherwise meritorious claims. This Section draws on informal attorney interviews to clarify how damage awards and other fee considerations factor into attorney decisionmaking in practice and the potential implications of these individual screening decisions in the aggregate. These conversations provide a closer look at how individual state laws incentivize attorneys to take specific types of cases, while likewise systematically preventing certain types of claims from reaching state courts.

To confirm and elaborate on the lessons from these quantitative findings, this Note sought out informal conversations with fifteen attorneys about the state-specific challenges they face in litigating tort suits for sexual assault.[136] Eight of these attorneys practice primarily in reform states, while the remaining seven attorneys practice primarily in non-reform states; however, many of these attorneys have litigated sexual assault cases in multiple states and could speak to challenges in contexts other than the state in which they primarily practice.

1. Collecting Awards from Individual Defendants After Judgment

Every attorney interviewed cited the challenges associated with collecting damage awards from assailants as a significant barrier in these suits.[137] In a standard tort suit, damage awards are typically

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guardian, J.B., and J.B., individually v. Don Harrison, No. 07-CA-12631, 2009 Jury Verdicts LEXIS 416953 (Jan. 28, 2009).

136. Anonymous notes from all telephone interviews on file with author.

137. *See supra* note 136. *See also* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights*

paid by the defendant's insurance company.[138] However, common homeowners', renters', and automobile insurance policies explicitly disclaim liability for intentional acts such as sexual assault and battery.[139] The lack of individual insurance coverage in these suits severely limits the number of defendants who are able to satisfy judgments as compared to the pool of defendants in tort suits at large.[140] Furthermore, even if a defendant has modest assets sufficient to satisfy a judgment, these will often be exhausted incurring the costs of legal counsel, such that there is little left for a plaintiff to collect after securing a judgment.[141]

Not only are many defendants unable to satisfy significant damage awards, but they are also able to flee a jurisdiction with relative ease.[142] Given that tort suits are civil claims, courts are unable to impose criminal sanctions to compel a defendant to satisfy a judgment.[143] Recognizing that defendants may attempt to evade payment even after a verdict is rendered, plaintiff-side attorneys are more likely to accept cases with high-profile defendants,[144] defendants

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in the Courts, 33 MCGEORGE L. REV. 689, 699 (2002) ("[I]n the vast number of cases the defendant has no assets to attract the interest of a civil lawyer.").

138. Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-Envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 CONN. INS. L.J. 209, 230 (2014–2015) ("Tort suits would not be brought if not for available liability insurance."); Swedloff, *supra* note 71, at 737 ("Liability insurance is typically the easiest and most available asset to satisfy a judgment. Access to insurance proceeds impacts the value of the underlying claim, and ultimately the ability to bring the claim.").

139. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 135–36 (2001); Knutsen, *supra* note 138, at 215–16.

140. Wriggins, *supra* note 139, at 138 ("Financial recovery against a defendant who lacks assets or insurance is not possible. Many persons in the United States are judgment-proof.").

141. Telephone Interview with Anonymous (Jan. 10, 2019); LeGrand & Leonard, *supra* note 60, at 485 n.10 (asserting that attorney fees and court costs will often deplete a defendant's total assets).

142. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 641 (2006).

143. *Id.* at 617–20 (detailing the challenges associated with collecting tort judgments and explaining how easily defendants may discharge a tort award by declaring bankruptcy). However, defendants cannot discharge awards in bankruptcy if their conduct reaches a standard of "willful and malicious injury . . . to another entity." 11 U.S.C. § 523(a)(6) (2018).

144. Chamallas, #*Me Too Moment?*, *supra* note 13, at 40 (identifying that the #MeToo movement has targeted powerful men).

with significant ties to their communities,[145] or institutional third-party defendants with "deep pockets."[146]

However, collecting a damage award can be difficult even in cases with wealthy, firmly-rooted defendants. Recognizing the potential for legal liability, wealthy individuals often consult with lawyers as to how best to shield their assets from future claims.[147] In addition, some state laws provide that primary residences are exempt from collection,[148] allowing wealthy defendants to protect a significant portion of their assets in real estate despite monetary judgments against them.[149] Therefore, in valuing a potential suit, an attorney needs to consider not only a defendant's net worth, but also the extent to which the defendant's assets are available for collection.[150]

2. Collecting from Institutional Third Parties

Given the challenges associated with collecting from individual defendants, attorneys in both reform and non-reform states reported that they typically only accept cases if they can name an institution with substantial assets as a co-defendant.[151] Attorneys commonly reported bringing claims against third parties, including employers, schools, medical facilities, and places of worship, for negligent hiring, supervision, and/or retention.[152] An increasing number of companies and organizations have purchased insurance coverage that extends to instances of sexual assault and harassment perpetrated by

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145. LeGrand & Leonard, *supra* note 60, at 484.

146. Gilles, *supra* note 142, at 606–07; Martha Chamallas, *The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons*, 10 J. TORT L. 1, 34 (2017).

147. Gilles, *supra* note 142, at 635.

148. Wriggins, *supra* note 139, at 138 n.81 ("Several states, including Florida, Texas, Iowa, South Dakota and Kansas, have unlimited homestead exemptions."); Paul Sullivan, *Safeguarding Your Assets Against the Hazards of a Lawsuit*, N.Y. TIMES (Nov. 2, 2012), https://www.nytimes.com/2012/11/03/your-money/safeguarding-assets-against-the-hazards-of-a-lawsuit.html (on file with the *Columbia Human Rights Law Review*) (noting that Florida and Texas "have homestead laws that allow primary residences to be excluded from lawsuits").

149. Swedloff, *supra* note 71, at 736.

150. Gilles, *supra* note 142, at 606 (claiming that attorneys will only generally sue "an affluent individual who neglects to take elementary precautions to protect his or her assets from tort liability").

151. *See supra* note 136.

152. Bublick, *Lessons for Courts*, *supra* note 14, at 84–90.

employees.[153] The availability of this coverage leads many attorneys to believe that they can secure a meaningful monetary recovery for their clients.[154]

Nevertheless, recovering from a third-party defendant is not without its challenges. The statutes of limitations for third-party liability are prohibitively short in some states.[155] Furthermore, many states impose damage caps in suits against government entities[156] and a few states, including Colorado, impose damage caps in suits against charitable organizations.[157] Given that third-party defendants frequently provide public services,[158] these caps can significantly limit a plaintiff's recovery even when a jury finds a third-party defendant with substantial assets liable.[159]

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153. Lininger, *supra* note 21, at 1573 ("[T]he greater availability of [negligence liability] insurance has created new incentives for civil claims."); Anderson, *supra* note 7, at 244 ("Courts have consistently held for sexual assault claimants in [insurance] coverage disputes over the negligent liability of . . . institutions for sexual assault."); Tamara Bruno, *An Overview of Insurance Coverage for Claims of Sexual Harassment and Assault*, 16 J. TEX. INS. L. 17, 21 (2018) (identifying that employers have increasingly purchased insurance policies that list sexual harassment as a covered offense).

154. Swedloff, *supra* note 71, at 738; Knutsen, *supra* note 138, at 225–26 (explaining how sexual assault survivors can sue third parties for negligence in an effort to collect from the third party's liability insurance). However, many attorneys cited the challenges of negotiating settlements with insurance companies in these cases. Because insurance companies have encountered these claims before, they may attempt to leverage their previous experiences with judge and jury bias against victims in order to negotiate lower pre-trial settlements for survivors. Telephone Interview with Anonymous (Jan. 10, 2019); Telephone Interview with Anonymous (Jan. 11, 2019); Telephone Interview with Anonymous (Jan. 14, 2019).

155. Chamallas, #*Me Too Moment?*, *supra* note 13, at 53–54, 65. *See* N.Y. C.P.L.R. 214 (McKinney 2019) (providing that the statute of limitations for sexual assault claims based in negligence is three years); MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (West 2018) (establishing a three-year statute of limitations for civil actions).

156. FLA. STAT. § 768.28(5) (2018); ME. STAT. tit. 14, § 8105 (2018).

157. COLO. REV. STAT. § 7-123-105 (2018) (limiting judgments against non-profits to the extent of existing insurance coverage); MASS. GEN. LAWS ch. 231, § 85K (2018) (imposing a $20,000 cap for any torts committed in the course of accomplishing an organization's charitable purposes); S.C. CODE ANN. § 15-78-120 (2018) (imposing a $600,000 cap per occurrence in suits involving charitable organizations).

158. Bublick, *Lessons for Courts*, *supra* note 14, at 66 ("The cases concern the responsibilities of schools, bus services, placement agencies, boy scout leaders, foster parents, hospitals, and mental health institutions.").

159. Telephone Interview with Anonymous (Jan. 10, 2019).

3. Comparative Negligence and Apportionment

Many attorneys also noted how state laws governing comparative negligence and apportionment can profoundly affect a survivor's recovery.[160] For example, Florida law prohibits juries from apportioning liability between a perpetrator and a third-party institution.[161] If found responsible, third-party defendants are jointly and severally liable for the full extent of a plaintiff's injuries; therefore, a plaintiff is more likely to achieve a full recovery.[162] In Colorado, in contrast, a jury may compare fault between an intentional tortfeasor and a negligent third party and apportion liability accordingly.[163] Usually this means that juries will apportion the majority of liability to the (often judgment-proof) assailant, and thus the plaintiff will not be able to recover the majority of damages awarded.[164]

Attorneys must carefully consider state statutes and policies concerning apportionment in determining their litigation strategy in a given case. Multiple attorneys reported declining to pursue any legal action against an individual assailant in an attempt to avoid having the jury explicitly or implicitly allocate fault to the perpetrator when determining damages against an institution.[165] Attorneys typically employed this strategy in states where statutes prohibit[166] or merely permit[167] the apportionment of fault to a non-party. Some states, in contrast, require juries to apportion liability to assailants even when

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160. Telephone Interview with Anonymous (Jan. 10, 2019); Telephone Interview with Anonymous (Jan. 11, 2019).

161. Merrill Crossings Assocs. v. McDonald, 705 So. 2d 560, 562 (Fla. 1997) (holding that "that negligent tortfeasors . . . should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence").

162. Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 379–80 (2003) [hereinafter Bublick, *End Game*] (noting that, absent apportionment, third-party defendants are responsible for paying more of a plaintiff's award).

163. Slack v. Farmers Ins. Exch., 5 P.3d 280, 286 (Colo. 2000) (concluding that liability may be apportioned between a negligent and an intentional tortfeasor).

164. Bublick, *End Game*, *supra* note 162, at 366.

165. Telephone Interview with Anonymous (Jan. 10, 2019); Telephone Interview with Anonymous (Jan. 11, 2019).

166. 735 ILL. COMP. STAT. 5/2-1117 (2018) (stating that, in Illinois, fault may only be attributed to "the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer").

167. TENN. CODE ANN. § 29-11-107(d) (2018) ("Nothing in this section limits the ability of the trier of fact to allocate fault to a nonparty to the suit . . . .").

they are not named as co-defendants.[168] In these states, the assailant's status as a non-party is unlikely to yield appreciable strategic benefits.

4. Punitive Damages

Attorneys also described the challenges associated with securing punitive damage awards in these suits. Many states have adopted sovereign immunity statutes prohibiting plaintiffs from pursuing punitive damages against the government.[169] In addition, several states prohibit insurance companies from covering punitive damages, such that punitive awards can only be satisfied from a defendant's assets.[170] If a defendant does not have sufficient assets to satisfy an award, punitive damages are often not worth pursuing.[171]

Even in cases where a defendant can satisfy a large punitive award, state and federal laws may limit the amount of punitive damages a plaintiff will ultimately receive. Several states, including Alaska, mandate that plaintiffs contribute a significant portion of their awards to a state fund,[172] while Illinois leaves the contribution determination to the discretion of the trial judge.[173] Additionally,

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168. ARIZ. REV. STAT. ANN. § 12-2506(B) (2018) ("In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit."); N.D. CENT. CODE § 32-03.2-02 (2017) ("The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury.").

169. ALASKA STAT. § 09.50.280 (2018); COLO. REV. STAT. § 24-10-114(4)(a) (2018); FLA. STAT. § 768.28(5) (2018); MISS. CODE ANN. § 11-46-15(2) (2018).

170. Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 427 (2005) (stating that California, Colorado, Florida, Kansas, Minnesota, New York, Ohio, Oklahoma, and Utah have prohibited insurance coverage for punitive damages on public policy grounds).

171. Telephone Interview with Anonymous (Jan. 10, 2019); Telephone Interview with Anonymous (Jan. 11, 2019); Telephone Interview with Anonymous (Jan. 15, 2019).

172. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 373 (2003) [hereinafter Sharkey, *Societal Damages*] ("Eight states currently have split-recovery statutes . . . : Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah."). In Alaska, 50% of any civil punitive damage award must be "deposited into the general fund of the state." ALASKA STAT. § 09.17.020(j) (2018).

173. 735 ILL. COMP. STAT. 5/2-1207 (2018) ("The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services.").

unlike compensatory awards,[174] the Internal Revenue Service requires that plaintiffs report and pay income taxes on punitive damages, which can further diminish their overall recovery.[175] These financial considerations may lead attorneys to determine that pursuing punitive damages is not ultimately in their clients' best interests.[176]

Multiple attorneys also mentioned the strategic difficulties associated with pursuing punitive damages against a third party.[177] Punitive damages are only available in cases where defendants exhibit willful or malicious conduct.[178] Attorneys repeatedly articulated the need to establish a highly egregious set of facts before making a plea for these damages,[179] given that third-party defendants frequently provide valued public services.[180] Facts rising to this level include institutional knowledge of an assailant's previous assaults or harassment,[181] the knowing disregard of specific requests or warnings made by a plaintiff,[182] or actions taken to intentionally cover up the assault in an effort to protect an institution's reputation.[183] Attorneys

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174. I.R.C. § 104(a)(2) (2018).

175. *Settlements – Taxability*, INTERNAL REVENUE SERV. (Dec. 2016), https://www.irs.gov/pub/irs-pdf/p4345.pdf [https://perma.cc/8ZWC-YWPP] ("Punitive damages are taxable and should be reported as 'Other Income' . . . .").

176. One attorney suggested that a plea for punitive damages may have the undesired effect of focusing the jury's attention on the fault of the perpetrator, rather than on the failures of the third-party institution, leading to a smaller overall verdict. Telephone Interview with Anonymous (Jan. 15, 2019).

177. Telephone Interview with Anonymous (Jan. 8, 2019); Telephone Interview with Anonymous (Jan. 10, 2019).

178. Bublick, *Lessons for Courts*, *supra* note 14, at 97 (stating that third parties are only liable for punitive damages in cases of malice, gross negligence, or reckless disregard).

179. Kanter, *supra* note 25, at 258 (claiming that "strong facts" are necessary in sexual assault cases against third parties).

180. Lininger, *supra* note 21, at 1570–71 (identifying that schools, apartment complexes, houses of worship, hotels, parking lots, hospitals, and jails are often named as defendants in sexual assault cases).

181. Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters*," 47 RUTGERS L. REV. 975, 1067–68 (1995) (citing an Idaho case where punitive damages were awarded against a hospital that failed to investigate "allegations of sexual misconduct against the doctor").

182. Paterson v. Deeb, 472 So. 2d 1210, 1220–21 (Fla. Dist. Ct. App. 1985) (holding that a sexual assault survivor stated a valid claim for punitive damages against her landlord because he repeatedly ignored her requests to provide locks or other security measures in the building).

183. Lininger, *supra* note 21, at 1580–81 (suggesting third parties may intentionally dispose of evidence in order to avoid liability); Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory*

must invest a significant amount of time, effort, and resources to uncover these facts, such that pleas for punitive damages can become extremely costly.[184] If attorneys are unable to assemble a set of facts demonstrating flagrant misconduct on the part of an institution, they risk losing credibility with a judge or jury in requesting punitive damages, and the time and resources spent in discovery become largely sunk costs.[185]

5. The Need for Expert Witnesses

A few attorneys practicing in reform states noted that noneconomic damage caps not only limit the amount of damages a plaintiff will be able to collect, but also can cause cases to become more expensive to litigate.[186] In order to secure a sizable award in these cases, attorneys must prove that a significant portion of a survivor's damages are in fact economic rather than noneconomic.[187] These cases accordingly become highly dependent on expert testimony. Lawyers must hire a range of experts—including psychiatrists, forensic scientists, vocational scientists, economists, nurses, and life-care planners—to quantify and testify to the economic harms a plaintiff has suffered as a result of the sexual assault, harms that without expert testimony might be classified as pain and suffering damages subject to

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Limits and the Promise of Tort Law, 78 MONT. L. REV. 31, 45–46 (2017) (describing how universities may deliberately underreport sexual assaults in order to protect their reputation and attract qualified students).

184. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1426, 1441–42 (1993) (claiming that lawyers must make "massive investments" and invest "substantial resources" in investigating cases with the potential for punitive damages).

185. Telephone Interview with Anonymous (Jan. 10, 2019).

186. Telephone Interview with Anonymous (Nov. 26, 2018); Telephone Interview with Anonymous (Jan. 11, 2019); Telephone Interview with Anonymous (Jan. 22, 2019).

187. Herbert M. Kritzer et al., *An Exploration of "Non-economic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1010 (2014) ("[I]n the face of caps, lawyers may seek to persuade the jury to award more damages in an uncapped category as a way of shifting damages from the capped category to types of damages that are not capped."). Conversely, lawyers in non-reform states stated that, if economic damages in a given case are relatively small, they will attempt to downplay these losses in favor of noneconomic losses so that the jury does not become fixated on an inadequate financial figure in awarding damages. Telephone Interview with Anonymous (Jan. 15, 2019); Telephone Interview with Anonymous (Jan. 15, 2019).

the statutory noneconomic damages cap.[188] Lawyers frequently pay for these expert witnesses out of pocket, a cost they are forced to internalize if the jury finds for the defendant or issues an award where the contingency fee does not fully cover these expenses.[189]

6. Judge and Juror Bias

Several attorneys mentioned how explicit and implicit biases create another significant barrier in litigating civil suits for sexual assault. Those who frequently litigate these cases identified that a considerable portion of their time is spent attempting to educate judges[190] and jurors on the troubling realities of sexual assault and its impact on survivors.[191] In Tennessee, for example, the state damage caps do not apply in the case that a defendant intends to inflict "serious physical injury" on an individual.[192] According to one attorney who practices in this state,[193] convincing a jury that a plaintiff who has been sexually assaulted has suffered "a serious physical injury" without additional evidence of physical abuse could pose a considerable challenge.[194]

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188. *See* Bruce Feldthusen, *Discriminatory Damage Quantification in Civil Actions for Sexual Battery*, 44 U. TORONTO L.J. 133, 137 (1994) (explaining the importance of expert testimony in quantifying a survivor's loss of earning capacity resulting from diminished self-esteem, which otherwise might be classified as a compensatory loss).

189. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 652 (2006) (quoting a lawyer as stating: "[T]he process of taking a case to court is getting enormously expensive . . . . I front all the costs and if we lose, I eat the costs.").

190. Telephone Interview with Anonymous (Jan. 11, 2019); Curcio, *supra* note 183, at 65 (explaining how judges view sexual assaults as attributable to individual bad actors and refuse to impose a duty on institutions to prevent them).

191. Daniels & Martin, *supra* note 189, at 652 (claiming that jurors are hesitant to award pain and suffering damages and that juror attitudes constitute a significant barrier in litigating tort cases). One attorney pointed out that jurors who have had personal experiences with sexual assault are often dismissed from these cases, and thus these juries may be disproportionately unaffected by sexual assault as compared to the general population. Telephone Interview with Anonymous (Jan. 15, 2019).

192. TENN. CODE ANN. § 29-39-102(h) (2018); TENN. CODE ANN. § 29-39-104(7) (2018).

193. Telephone Interview with Anonymous (Jan. 11, 2019).

194. These challenges may be more pronounced in tort reform states, whereby some accounts jurors become more "anti-plaintiff" as a result of exposure to political campaigns championing tort reform. Daniels & Martin, *supra* note 189, at 651.

Some attorneys expressed optimism that the #MeToo movement has made these suits less challenging. They reported that #MeToo has made it easier to convince a jury of the emotional harms a survivor has suffered, to negotiate adequate settlement awards with insurance companies and mediators, and to justify taking these cases to their colleagues and firms.[195]

As these conversations demonstrate, survivors face considerable challenges in their attempts to secure meaningful recoveries for sexual assault in tort. In many cases, state statutes limit the extent to which plaintiffs can recover from otherwise solvent defendants, thus substantially limiting survivors' overall potential damage awards. Attorneys, aware of the significant costs associated with litigating these suits and the difficulties of obtaining favorable judgments, may be reluctant to accept and litigate sexual assault cases on a contingency basis.

III. TORT SOLUTIONS AND THE CRIMINAL RESTITUTION ALTERNATIVE

Sexual assault survivors face significant barriers at every stage in their attempts to recover damages in tort, from obtaining legal representation to securing an adequate award to collecting the award from liable defendants. While changes in tort law to minimize or alleviate these burdens are certainly possible, such as laws expanding third-party liability or eliminating damage caps in cases of sexual assault, these reforms may undermine the core objectives tort law seeks to promote. In certain circumstances, such changes might even have detrimental consequences in the broader context of sexual assault law. This suggests that pursuing reforms to the criminal process, in conjunction with tort suits, may ultimately be more impactful in vindicating the interests of survivors and society as a whole.

This Part examines the limitations of the tort regime in adequately redressing instances of sexual assault, and proposes that the goals and benefits of such tort suits instead be more vigorously pursued through the criminal process via criminal restitution. Section III.A outlines potential approaches states might consider in attempting to increase survivor damage awards, and discusses the shortcomings of these reforms in light of tort law's underlying goals of deterrence,

195. Telephone Interview with Anonymous (Jan. 11, 2019); Telephone Interview with Anonymous (Jan. 14, 2019); Telephone Interview with Anonymous (Jan. 15, 2019).

victim compensation, and offender accountability.[196] Section III.B then suggests changes to existing state systems of criminal restitution in order to ensure that the legal rights of all survivors are adequately protected and the goals of corrective justice are fully realized. These suggestions include placing statutory duties on prosecutors to demand restitution for sexual assault survivors, requiring judges to scrutinize plea bargains to ensure that victims' interests are adequately represented, and promoting greater survivor involvement in the plea bargaining process.

A. Tort Solutions and Their Limitations

The data in this Note illustrate that the size of a survivor's potential damage award has a demonstrable effect on attorney willingness to litigate tort suits for sexual assault.[197] In order to increase the number of survivors who successfully bring suits, states may choose to adopt legal reforms that enable plaintiffs to win significantly larger damage awards as a matter of course. This, in turn, is likely to increase attorneys' willingness to accept these cases on a contingency fee basis.[198]

However, as a practical matter, it is worth questioning the extent to which significantly larger damage awards will advance tort law's goals of deterring future sexual assaults and making survivors whole,[199] as opposed to primarily facilitating wealth transfers to plaintiff-side attorneys.[200] While larger damage awards would almost certainly increase the frequency of tort suits for sexual assault, the ways in which these damage awards would be operationalized could potentially undermine the goals tort law intends to serve: victim compensation, retribution, and deterrence.[201] For this reason, simply

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196. Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 948–49 (2004).

197. *See supra* Sections II.B, II.C.

198. *See supra* note 78.

199. Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 449–50 (2011) (identifying victim compensation and deterrence as the primary and secondary purposes of tort law); Wriggins, *supra* note 139, at 145–46 (naming deterrence and compensation as the "central purpose[s] of tort law); Swedloff, *supra* note 71, at 726 (noting tort law's deterrence and compensation functions).

200. Brickman, *supra* note 85, at 1760.

201. Buel, *supra* note 196, at 948–949.

maximizing a survivor's potential damage award is a viable but insufficient solution to the current problem. This Section considers a few ways to augment damage awards, including expanding the scope of individual insurance coverage, broadening the pool of third-party defendants who can be held liable for negligence, and eliminating statutory damage caps in cases of sexual assault. This Section then considers the limitations of these approaches in light of tort law's underlying goals.

1. Attaching a "Deep Pocket"

One way to increase the size of potential damage awards is to broaden the pool of actors with a "deep pocket" who can be held liable as co-defendants.[202] These defendants might include perpetrators' insurance companies or third-party institutional actors somehow tied to the assault, both of which would be capable of discharging large damage awards when an assailant is a flight risk or otherwise insolvent.[203]

However, any reforms transferring financial responsibility from individual defendants to their insurance companies may undermine the deterrence value of these suits.[204] Allowing individuals to insure against damages resulting from sexual assaults ex ante could lead to troubling consequences in the long term,[205] as insurance coverage might create a "moral hazard," authorizing certain individuals to act recklessly or with impunity knowing they are shielded from monetary liability.[206] Recognizing this threat, the vast majority of insurance companies currently disclaim coverage for

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202. Anderson, *supra* note 7, at 243–44.

203. Bublick, *Lessons for Courts*, *supra* note 14, at 100–01; Lininger, *supra* note 21, at 1569–70.

204. Increasing insurance coverage is also unlikely to achieve meaningful compensatory goals, given insurance companies typically only cover economic losses. Swedloff, *supra* note 71, at 745.

205. Gilles, *supra* note 142, at 704–05; Swedloff, *supra* note 71, at 740 (articulating concerns that "allowing coverage for intentional bad acts will encourage wrongdoing, undermine the punitive aspects of tort, and transgress . . . moral norms").

206. Meagan McKeown, *Indemnification Agreements for Intentional Misconduct: Balancing Public Policy and Freedom to Contract in Texas*, 46 ST. MARY'S L.J. 345, 361–62 (2015) ("[P]ublic policy precludes a person from using insurance coverage to protect oneself against one's own intentional misconduct. . . . The insured is more likely to act in a way likely to cause harm if they believe the financial burden of that behavior will fall on the pockets of the insurance company.").

intentional acts.[207] Therefore, although increasing the scope of individual insurance coverage to include sexual assault may lead to an uptick in the number of tort suits litigated for these harms,[208] doing so could adversely affect an insured's behavior by implicitly sanctioning future bad acts.[209]

Alternatively, expanding the negligence liability of third-party institutional actors could have a marked positive impact in the long-term. Fearing the threat of liability, these actors might develop more effective systems to protect against future assaults[210] by strengthening existing procedures related to hiring and admission, ongoing monitoring, preventative education, and disciplinary proceedings.[211] These innovations could potentially lead to an overall decrease in the number of sexual assaults and productive mindset shifts amongst those who interact with the institution.[212] Holding third parties accountable can also have important compensatory benefits for survivors, who often feel as though an institution failed or wronged them in some way.[213] States could promote more expansive third-party liability by lowering the foreseeability threshold required for a plaintiff to attach a third-party defendant, extending statutes of limitations against negligent institutions in sexual assault cases, and/or adopting policies that require third-party actors to purchase applicable insurance coverage.[214]

Nonetheless, this approach will only partially address the complexity of the current problem. Shifting the majority of financial responsibility from individual assailants to institutional third parties will have limited utility in deterring assaults that occur outside of an institutional context or in cases where an institution has met its

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207. Wriggins, *supra* note 139, at 135–36.

208. Swedloff, *supra* note 71, at 739 (identifying that liability insurance helps to increase "the predicted profitability and expected value of a suit").

209. McKeown, *supra* note 206, at 374–75 ("Security from the costs associated with the consequences of intentional torts or willful negligence leaves minimal incentive to maintain the standards of care envisioned by the foundations of tort law.").

210. Bublick, *Citizen No-Duty Rules*, *supra* note 21, at 1423.

211. Anderson, *supra* note 7, at 244; Curcio, *supra* note 183, at 33–42.

212. Bublick, *Citizen No-Duty Rules*, *supra* note 21, at 1454–56 (explaining how third-party tort liability encourages the development of institutional designs that deter crime and limits the blame placed on victims for their assaults); Lininger, *supra* note 21, at 1576–77.

213. Lininger, *supra* note 21, at 1603 (claiming that some survivors sue third parties to "force [the] adoption of safeguards" that will help prevent future rapes).

214. *See supra* Section II.C.2.; *see supra* note 153 and accompanying text.

burden of due care.[215] Therefore, despite its merits, this approach does not afford a wholly satisfactory solution for holding assailants accountable or deterring individual actors from engaging in future assaults, as it demands little tangible recovery from perpetrators themselves.

Additionally, in some cases, this approach may lead attorneys to downplay the culpability of the assailant in favor of focusing on the negligence or dereliction of a third party.[216] This strategy, geared primarily towards securing financial compensation for plaintiffs and their attorneys,[217] may undercut the extent to which survivors are personally and psychologically made whole by the assurance that their attackers will be held responsible for their actions.[218] Theoretical victories with no impact on the livelihood of individual defendants are unlikely to provide survivors with this much needed assurance,[219] and the lack of tangible assailant liability in these cases may send an ambiguous message to the public about their moral culpability.[220]

2. Eliminating Damage Caps and Increasing Punitive Damage Awards

Another way to increase the size of potential damage awards is to eliminate damage caps in tort suits for sexual assault and to instruct juries to award punitive damages more liberally.[221] As historical jury verdict data from Florida illustrate, the possibility of outsized punitive

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215. Bublick, *Lessons for Courts*, *supra* note 14, at 85.

216. *Id.* at 61 (claiming that the assailant's responsibility "is a far less frequent focus of the inquiry. Instead, current appellate-level tort litigation is more frequently focused on the liability of third-party actors . . . .").

217. Anderson, *supra* note 7, at 244–45 (explaining that suits against third-party institutional defendants have "eclipsed" direct suits against assailants due to the financial incentives for plaintiff-side attorneys to bring these cases).

218. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275, 276, 300 (2001) (describing how, in circumstances of intentional misconduct or gross negligence, "blood money," or money paid by defendants out of their own pockets, may have more subjective value to plaintiffs than awards paid by insurance companies or other third parties).

219. Anderson, *supra* note 7, at 245; Swedloff, *supra* note 71, at 739 (explaining how, in cases of intentional torts, attorneys are tempted to seek blood money on behalf of their clients).

220. Finley, *supra* note 61, at 1301 (asserting that tort awards serve as an expression of community values); Wriggins, *supra* note 139, at 148 (describing how tort liability creates a narrative about what constitutes socially acceptable behavior); Swedloff, *supra* note 71, at 767.

221. Finley, *supra* note 61, at 1301.

damage awards may lead attorneys to accept and litigate a wider range of cases.[222] Given the possibility that any such case may lead to a significant payout, these awards may make it cost-effective for attorneys to take on more cases—and potentially riskier cases—over time.[223] This could allow a wider range of plaintiffs to obtain legal representation and have their claims validated in court.[224] This approach would also allow plaintiffs in tort reform states to negotiate larger settlement awards pre-trial.[225]

However, eliminating damage caps will not solve many of the conventional problems associated with collecting judgments from defendants.[226] This is evident from the fact that plaintiffs still file tort suits for sexual assault relatively infrequently on the whole, even in states that have not passed relevant statutory caps.[227] Fundamental collection issues, such as defendant insolvency, asset shielding, apportionment, and insurance coverage exemptions, significantly diminish the tangible liability of defendants in these suits, therefore limiting the corresponding deterrence of these judgments.

Relatedly, although encouraging larger punitive damage awards may afford more and a wider range of plaintiffs access to the civil courthouse, one might inquire whether the magnitude of these awards—such as those seen in Florida in the last decade—serve the underlying goals of tort suits in these cases.[228] Despite the serious financial losses associated with sexual assaults, survivors generally do not bring these suits with the primary goal of financial gain.[229] While these plaintiffs hope to secure a large enough award to pay their

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222. Daniels & Martin, *supra* note 189, at 663 (providing anecdotal evidence that larger damage awards give lawyers the opportunity to test novel theories of liability in marginal cases).

223. Trautner, *supra* note 87, at 535.

224. Eliminating noneconomic damage caps is likely to have a particularly pronounced effect in enabling low-wage earning individuals to access the civil justice system. Finley, *supra* note 61, at 1313.

225. Daniels & Martin, *supra* note 189, at 648 (explaining how damage caps cause skilled lawyers to exit the market to pursue more lucrative opportunities, which increases a defendant's bargaining power during settlement).

226. *See supra* Section II.C.

227. *See supra* note 15.

228. Catherine Sharkey points out that punitive damages are typically envisioned as a way to punish wrongdoers and vindicate societal interests, rather than as a means for compensating an individual. Therefore, some argue that the financial windfall a plaintiff receives from an award of punitive damages is inefficient and problematic. Sharkey, *Societal Damages*, *supra* note 172, at 370–73.

229. Slyder, *supra* note 21, at 559–60; *see supra* note 66.

attorneys, hold their assailants accountable, and be made financially and personally whole, the stigma surrounding a plaintiff profiting from an assault is a common reason why some survivors do not file civil suits in the first place.[230] In cases where jury verdicts total in the hundreds of millions, there remains a question as to whether awards of this magnitude meaningfully advance the goals of deterrence and victim compensation, or simply facilitate a wealth transfer to the lawyers who litigate these cases.[231] To the extent that these damage awards flow to attorneys rather than providing meaningful benefits to victims or society at large, states have a valid interest in limiting the size of these judgments.[232]

B. Criminal Restitution as an Additional Tool

Although increasing the size of potential damage awards is likely to increase the number of tort suits for sexual assault brought on a contingency fee basis, these larger awards may be difficult to operationalize in a way that holds assailants accountable, fully compensates survivors for the harms they have suffered, and deters future assaults. Given these tensions, the interests of survivors might be better served by bringing the benefits of tort law to the criminal system, which could then operate in concert with existing suits for sexual assault to achieve tort law's underlying goals.[233] Pursuing reforms in the criminal rather than civil context would alleviate the need for survivors to obtain costly legal representation, render damage awards more accurately calibrated to the harms a survivor has suffered, and enable courts to enforce judgments via criminal sanctions.[234]

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230. Anderson, *supra* note 7, at 259; Lininger, *supra* note 21, at 1564–65 (quoting a commentator as stating, "many rape victims . . . conclude that forswearing any interest in civil damages is the price they must pay to establish their own credibility").

231. Brickman, *supra* note 85, at 1767–69.

232. Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 551–52 (2014) (explaining that tort reforms in the 2000s were aimed at eliminating or limiting "'the trial lawyers' system of jackpot justice'").

233. *See* David A. Starkweather, Note, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 860 (1992) (arguing against limiting restitution to the civil forum).

234. Gilles, *supra* note 142, at 686 (noting how restitution awards in criminal cases increasingly function as an alternative to tort damages).

As the #MeToo movement has demonstrated, there are many instances of sexual assault that prosecutors may not believe constitute viable criminal cases under current standards, but that society would still like to acknowledge and deter. Prosecutors may abandon these cases because they do not believe that they can prove a case against a defendant beyond a reasonable doubt, or because they are concerned that, given the potential for incarceration, a jury is unlikely to convict a defendant based on the facts at hand.[235]

One way prosecutors might accomplish these goals is through the more robust use of criminal restitution during plea bargaining and sentencing.[236] Criminal restitution is "a court order directing an offender to financially compensate his victim for the expenses and losses incurred by the victim as a result of the offender's crime."[237] Every state currently allows for criminal restitution,[238] and courts can require that defendants pay not only for victims' economic losses, but for their noneconomic losses, consequential losses, and attorney fees as well.[239] Courts can impose restitution in cases where a jury has not found a defendant to be guilty of the alleged criminal conduct, and even in some cases where the defendant has been acquitted.[240]

Judges ordinarily calculate restitution damages during the sentencing phase of trial. In evaluating a survivor's restitution request, judges may consider a wide range of sources, including those which might not otherwise meet the standards of admissible evidence.[241] This calculation "does not require mathematical precision," and judges are entitled to estimate a victim's overall losses based on existing facts in

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235. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1209 (1997); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 201 n. 53 (2017).

236. Restitution was only ordered in about 16% of criminal rape and sexual assault cases in 2004. Swedloff, *supra* note 71, at 753.

237. Ryan Anderson, Note, *Criminal Law: The System Is Rigged: Criminal Restitution Is Blind to the Victim's Fault*—State v. Riggs, 43 MITCHELL HAMLINE L. REV. 140, 142 (2017).

238. *Id.* at 148.

239. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97, 102 (2014) [hereinafter Lollar, *Criminal Restitution*]; Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution Is Sought*, 33 CARDOZO L. REV. 297, 312 (2011).

240. Lollar, *Criminal Restitution*, *supra* note 239, at 98. This power varies by state. Jeffrey A. Parness et al., *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 822–23 (2010). Some states allow victims to recover at sentencing for uncharged offenses or dismissed charges. *Id.* at 850.

241. DiBari, *supra* note 239, at 298.

the record.[242] Practically, this places a much lower burden on survivors to prove the extent of the harm they have suffered in order to receive an adequate and commensurate financial award.[243]

Criminal restitution awards are also easier to collect than tort judgments. Restitution awards are non-dischargeable in bankruptcy,[244] and courts can impose criminal sanctions in order to collect judgments from defendants who intentionally avoid payment.[245] Furthermore, many states provide that assets that are exempt from civil collection are not likewise exempt from criminal restitution judgments.[246] Criminal restitution thus can effectively provide many of the same benefits as tort judgments, while posing fewer collection challenges for survivors and their attorneys.[247]

Despite the many benefits of criminal restitution awards, prosecutors currently have few incentives to pursue them in cases where they are available.[248] For example, in Indiana, prosecutors need only inform a victim that restitution is an available remedy and assist victims in assembling their requests; prosecutors need not take any steps to affirmatively prove that the victim has a right to restitution or that the amount claimed is accurate.[249] Similarly, in Wyoming,

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242. *Id.* at 319; Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 104 (2015).

243. James M. Bertucci, Note, Apprendi-*Land Opens Its Borders: Will the Supreme Court's Decision in* Southern Union Co. v. United States *Extend* Apprendi*'s Reach to Restitution?*, 58 ST. LOUIS U. L.J. 565, 569–70 (2014) (noting that the facts used to calculate restitution need not be "presented to nor found by a jury during trial"); Swedloff, *supra* note 71, at 750 (explaining how restitution places the burden on the government, not the victim, to "establish the amount of the loss").

244. Gilles, *supra* note 142, at 687.

245. Lollar, *Criminal Restitution*, *supra* note 239, at 98; Parness et al., *supra* note 240, at 861–62, 864.

246. Gilles, *supra* note 142, at 688.

247. *Id.* at 688–89. Although criminal restitution awards may pose fewer collection challenges for survivors, there are still many instances where restitution goes unpaid, and courts subsequently forgive these awards without consequences to a criminal defendant. For an analysis of the challenges associated with collecting criminal restitution awards, particularly in cases where offenders are unable to pay, *see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION (2018).

248. Gilles, *supra* note 142, at 689; Parness et al., *supra* note 240, at 859 (explaining that limited funding and personnel often limit a prosecutor's ability to fully investigate and present a request for criminal restitution on behalf of a victim); Gillis & Beloof, *supra* note 137, at 695.

249. Graham C. Polando, *Why Should the Prosecutor Present Restitution Evidence?*, RES GESTAE, April 2013, at 39, 39.

prosecutors are only required to present a victim's claims for restitution to the court—they need not investigate whether the victim has a viable claim or independently seek recovery.[250] Prosecutors rarely seek restitution in criminal sexual assault cases[251] and often decline to give victims a role in the plea bargaining process due to concerns that their participation will lead to inefficiencies or will result in fewer pleas.[252] The lack of victim involvement throughout this process can aggravate a survivor's feelings of helplessness, especially in circumstances where prosecutors decline to press charges or opt to reduce charges in order to secure a plea.[253]

As the preceding paragraph illustrates, pursuing financial recovery in the criminal rather than the civil forum is not without its disadvantages for survivors. Prosecutors, rather than plaintiffs, determine whether to pursue legal action and drive the course of the lawsuit. When prosecutors decline to press charges or accept a guilty plea without consulting a victim, they deprive survivors of their opportunity to be heard and undermine survivor agency in the legal process. As such, reforms to criminal restitution are an admittedly imperfect alternative to tort suits for sexual assault, given that many of the empowering aspects of tort law may be lost in the criminal context. Despite these drawbacks, however, criminal restitution provides a viable alternative for survivors who cannot afford or otherwise obtain civil counsel. Given the challenges associated with securing damage awards in tort suits and the lack of wholly satisfactory reforms to address these challenges, criminal restitution can function as a practicable and useful supplement to tort suits in advancing the legal system's corrective justice goals.

Criminal restitution statutes provide prosecutors with a powerful tool for redressing the harms suffered by survivors. In light of the pressing sexual assault epidemic in the United States, prosecutors must demonstrate a greater willingness to demand

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250. Parness et al., *supra* note 240, at 852.

251. Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 356 (2013).

252. Starkweather, *supra* note 233, at 875. Existing research suggests that victim participation does not interfere with the prosecutor's goals during plea bargaining. *Id.*

253. *Id.* at 865; *see* Heather R. Hlavka, *Legal Subjectivity Among Youth Victims of Sexual Abuse*, 39 LAW & SOC. INQUIRY 31, 35–36 (2014) (analyzing the role of procedural justice in encouraging rape reporting, and noting that "[m]any [sexual assault] victims report negative encounters with community and legal professionals following disclosure").

restitution for victims, whether it be through pre-indictment settlement negotiations, the plea bargaining process, or post-trial sentencing. Legislatures should impose statutory duties on prosecutors to this end,[254] requiring that prosecutors consistently seek restitution awards on behalf of sexual assault survivors and that prosecutors or other state employees provide support in completing restitution requests such that it is unnecessary for survivors to obtain independent representation.[255] In addition, legislatures should require judges to hold prosecutors accountable by only entertaining plea agreements that have taken account of a victim's perspective and interests.[256] These reforms would not only enable survivors who cannot afford legal representation to obtain financial recoveries for their assaults, but could also help to integrate a baseline level of survivor agency and participation into the plea-bargaining process.

Because charging decisions rest solely with prosecutors, the effectiveness of criminal restitution as an alternative to tort suits depends largely on prosecutorial willingness to prioritize victims' rights over favorable conviction rates in cases of sexual assault.[257] Prosecutors should focus less on the potential for obtaining a conviction or palatable plea deal in determining which sexual assault cases to pursue.[258] Instead, prosecutors should focus on the potential to leverage restitution and other alternatives to incarceration during the plea bargaining process to secure favorable outcomes for survivors and to vindicate their rights. Accordingly, prosecutors will pursue a higher

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254. *See* Parness et al., *supra* note 240, at 852.

255. For example, Oklahoma law requires that district attorneys provide all crime victims with a restitution form regardless of whether the victim specifically requests it or whether the case is brought to trial. District attorneys must provide victims with support in completing the request. Furthermore, the law states that "[i]n a plea bargain, the district attorney in every case where the victim has suffered economic loss, shall, as a part of the plea bargain, require that the offender pay restitution to the crime victim." OKLA. STAT. tit. 22, § 991f(3)–(4) (2018). Pennsylvania likewise places a duty on prosecutors to investigate and make a recommendation as to restitution, even if the victim does not participate in assembling the request. 18 PA. CONS. STAT. § 1106(4)(i)–(iii) (2018). This statute ensures that survivors need not obtain their own legal representation in order to receive a restitution award.

256. Parness et al., *supra* note 240, at 876; Gillis & Beloof, *supra* note 137, at 694.

257. Bryden & Lengnick, *supra* note 235, at 1246 (citing studies indicating that the likelihood of conviction is a prosecutor's prevailing consideration in determining whether to prosecute a rape case).

258. *Id.* (explaining that prosecutors routinely screen out certain types of rape cases as "un-winnable" due to professional and political considerations).

volume and wider range of sexual assault cases, including those which otherwise might not be considered politically or professionally viable for prosecution.[259]

The vast majority of criminal cases are resolved by plea bargain, and prosecutors may find success in persuading otherwise "un-prosecutable" defendants to agree to significantly lesser charges on the condition that they also agree to provide financial compensation to a victim.[260] Prosecutors might also find success in negotiating pleas by allowing survivors to play a greater role in the process, and state legislatures may find it appropriate to mandate that prosecutors allow for some level of survivor participation in these proceedings. Survivor participation is not only empowering, thus importing one of the central benefits of tort suits to the criminal law,[261] but also frequently leads to the more efficient disposition of cases.[262] This is because victims generally advocate for alternatives to incarceration, such as restitution or community service.[263] This increased efficiency in reaching dispositions could allow prosecutors to take on more sexual assault cases, despite existing limitations on personnel, funding, and resources.

Prosecutors and other state actors can also play a more active role in promoting pre-indictment settlement agreements between a survivor and a defendant.[264] For example, Texas and Virginia give survivors the opportunity to negotiate restitution awards directly with their assailants with the assistance of volunteers and/or state aides.[265] Although these meetings typically occur after conviction in these states, a similar model could be employed pre-indictment with

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259. *See* Polando, *supra* note 249, at 39 (claiming that crusading for victims can be a powerful way to win political elections and gain goodwill).

260. Starkweather, *supra* note 233, at 861; Bublick & Mindlin, *supra* note 16, at 5 (stating that some defendants are more willing to admit wrongdoing when faced with monetary and nonmonetary damages as opposed to a conviction).

261. Swan, *Between Title IX*, *supra* note 33, at 972–73 (asserting that the criminal law is disempowering to the extent that it "does not honor the wishes of the person actually harmed").

262. Starkweather, *supra* note 233, at 875.

263. *Id.*

264. William H.J. Hubbard, *Civil Settlement During Rape Prosecutions*, 66 U. CHI. L. REV. 1231, 1258 (1999) (noting that parties can settle a civil sexual assault case while criminal charges are pending and that pre-trial settlements are presumptively legal).

265. Parness et al., *supra* note 240, at 859–60.

prosecutorial oversight.[266] These meetings would empower survivors to confront their assailants in a controlled environment and to demand compensatory damages for their losses without the need for an attorney or a lengthy trial.[267]

CONCLUSION

As the rise and sustained momentum of #MeToo reveals, sexual assault is a pervasive issue in the United States. Barriers to lawsuits in both the civil and criminal contexts prevent millions of survivors from pursuing legal recourse and leave assaults undeterred. In the civil context, obtaining legal representation can prove to be an insurmountable barrier for those who wish to come forward. As this Note suggests, contingent fee considerations may lead attorneys to engage in a screening process that systematically excludes certain plaintiffs from state courthouses, regardless of the merits of their claims.

These screening decisions have the potential for deeply problematic consequences in the aggregate. Recognizing the significant costs of these suits and the myriad of challenges associated with securing sizeable damage awards, attorneys may more aggressively screen out claimants they believe a jury is unlikely to find sympathetic or credible—a highly subjective determination presumably shaped by racial, gendered, socioeconomic, and other biases. Additionally, statutory caps, insurance exemptions, and other limitations on noneconomic damages may lead attorneys systematically to screen out claims from women, children, and low-income individuals whose loss of future earning capacity is unable to support a sizeable economic award.

Given the challenges many survivors face in obtaining legal representation in the civil context, reforms to existing systems of criminal restitution are necessary in order to ensure that *all* survivors have the opportunity to seek redress for their losses and meaningfully vindicate their rights in a legal forum. Although the criminal system may not afford the same levels of voice or agency that plaintiffs

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266. Prosecutorial oversight would enable the government to take account of previous allegations against a defendant and to discern patterns of troubling behavior that individual plaintiffs may not be able to assess. Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 337–38, 340 (2018).

267. Parness et al., *supra* note 240, at 859–60.

experience in tort, criminal restitution can provide recovery for a wider range of survivors and hold otherwise insolvent perpetrators accountable in ways not currently feasible within the existing tort system. Prosecutors and judges can work to import the empowering benefits of tort law to the criminal system by consistently demanding restitution in cases of sexual assault and encouraging meaningful victim participation in the plea-bargaining process. Legislatures can also impose statutory duties on both prosecutors and judges to this end.