RECENT DEVELOPMENTS

RAPED AT WORK: JUST ANOTHER SLIP, TWIST, AND FALL CASE?

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ABSTRACT

In this Recent Development Article, the authors argue that current workers' compensation law has not adequately served the needs of women who have been raped at work. After providing an overview of workers' compensation law, the authors review cases in which the court determined that a woman's only remedy for a workplace rape is the limited compensation available under workers' compensation law. The authors analyze how these cases and other legal doctrine reflect an insensitivity to rape in the law. They then argue that rape is an extraordinary injury and therefore should not be treated like purely physical injuries more commonly covered under workers' compensation. The authors conclude that the purposes of the Workers' Compensation Act have been subverted when they are applied to rape cases in the workplace. Instead, the authors argue, women who have been raped at work should be able to choose between a tort remedy and workers' compensation coverage.

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There is no difference between being raped
and being pushed down a flight of cement steps
except that the wounds also bleed inside.
There is no difference between being raped
and being run over by a truck
except that afterward men ask if you enjoyed it.
There is no difference between being raped
and being bit on the ankle by a rattlesnake
except that people ask if your skirt was short
and why you were out alone anyhow.
There is no difference between being raped
and going head first through a windshield
except that afterward you are afraid
not of cars but half the human race.

Marge Piercy
Rape Poem
LIVING IN THE OPEN
1976

I. INTRODUCTION

Since the initial enactment of the Workers' Compensation Act, society has undergone dramatic changes that have not been reflected in recent attempts to expand the use of workers' compensation law. Contemporary needs and responsibilities require caution when extending immunity from common law liability to

employers.[1] For instance, in cases where rape occurs in the workplace, should the law respond to such trauma as if it is just a slip and fall case in slightly different garb? What are the social policies that are strengthened when "injuries" are imputed with quite different symbolic and psychological meanings?

Courts have generally been hesitant to interfere with the application of workers' compensation statutes to rape. This Article will: (1) provide a legal overview of workers' compensation as a concept in our legal system; (2) review pertinent case law; (3) describe the law's general insensitivity to the impacts of rape on the victim; (4) present arguments that rape is an extraordinary injury and, hence, not just another workplace injury; (5) suggest a rationale for why rape victims in the workplace should not be restricted to the dictates of a workers' compensation schedule as their sole remedy; and (6) argue that the purposes of the Workers' Compensation Act have been subverted.

II. THE CONCEPT OF WORKERS' COMPENSATION IN THE LAW

Remedies for workplace injuries were virtually nonexistent at the turn of the 20th century.[2] The lack of remedies can be attributed to several trends within the American workplace at that time. The rise of industrialization sharply increased the number of workplace injuries.[3] The high number of injuries actually impeded workers' abilities to be compensated; it was as-

1. *See, e.g.*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 663 (6th Cir. 1979). This opinion reflects the court's recognition that workers' compensation statutes are now functioning in a different environment from that existing at their inception. The court specifically mentioned as a contextual change the expansion of tort liability, which arose as a result of the narrowing or the abandoning of the defenses of contributory negligence, assumption of risk, and the fellow servant rule. The court then decried the failure of workers' compensation benefits to be adjusted upward in recognition of these changes in tort law. The court's response was to expand the employee's ability to seek tort remedies in dual-capacity cases.

2. *See* Martha S. Davis, *Rape in the Workplace*, 41 S.D. L. REV. 411, 416 (1996). Davis notes three successful defenses used by employers that were detrimental to workers seeking compensation for injuries. First, employers claimed that they were not responsible for injuries to an employee that were caused by another employee. Second, employees were expected to have understood the risk involved in their particular profession. Third, employers argued the defense of contributory negligence. This defense asserts that if the employee did not take the necessary precautions to avoid a dangerous situation, then the employer could not be held liable. Because the legal system, as well as society in general, accepted these defenses, workers were generally helpless against the power of their employer. *Id.* at 417.

3. *See id.*

sumed that workers were aware of and voluntarily accepted[4] the risks of their work.[5] The rapid replacement of small businesses with large corporations also encumbered workers' rights. Employers were no longer treated as individuals, but as abstract corporate entities consisting of only employees.[6] Without a single employer specifically in charge of the employees, no individual could be held liable for injuries.[7]

Prior to workers' compensation, the legal system failed to protect employees from the risks of employment. Intolerance for these unfair practices grew in tandem with the American Progressive Movement.[8] Public demands for reform resulted in the creation of the workers' compensation system. The system was one of several protections afforded to employees in an effort to erode employers' domination in labor markets.

Upon institution of the workers' compensation system, statutes were developed at both the state and federal levels.[9] Though the particulars of these statutes vary, essentially they all "furnish a remedy to an employee against an employer for injuries or disabilities when there is a substantial causal relationship between the employment and the injury."[10] The state and federal statutes share several other characteristics:[11] (1) If an employee suffers from an injury, occupational disease, or death that

4. Voluntary exchange as a legitimizing device for harm is a common motif in individualistic American thought. For example, it is used to counsel quietism in the face of the gender wage gap and environmental hazards. *See* M. Neil Browne & Michael D. Meuti, *Individualism and the Market Determination of Women's Wages in the U.S., Canada, and Hong Kong*, 21 LOY. L.A. INT'L. & COMP. L.J. 355 (1999); Nancy K. Kubasek et al., *It Takes an Entire Village to Protect an Endangered Species: Individualism, Overlapping Spheres, and the Endangered Species Act*, 10 FORDHAM ENVTL. L.J. 155 (1999).

5. *See* Davis, *supra* note 2, at 418. To illustrate the deleterious effect of an increase in workplace injuries on workers' rights, Davis tells the story of a railroad worker who lost his leg while working on the line. When the disabled worker tried to collect damages, the court ruled that lost legs were so common among railroad workers that the injured party had to be aware of the risk associated with his job. Awareness of risk thereby negated any remedies.

6. *See id.*

7. *See id.*

8. *See id.* at 414.

9. *See id.* at 415. *See generally* ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW (2000) [hereinafter LARSON'S]. Professor Larson's multi-volume treatise on workers' compensation provides a comprehensive explanation and evaluation of these statues. Courts and legal scholars often cite the treatise as the definitive guide to workers' compensation.

10. *See* Elliot J. Katz, Annotation, *Workers' Compensation: Sexual Assault as Compensable*, 52 A.L.R. 4th 731 (1987 & Supp. 1999).

11. *See* Davis, *supra* note 2, at 415.

prevents him or her from performing as usual at work, then he or she is entitled to compensation. The injury must be shown to have arisen "out of and in the course of employment;"[12] (2) contributory negligence does not result in lessened compensation benefits for the employee. Similarly, the employer can be completely free from fault, yet still responsible for the injury; (3) workers' compensation statutes cover only employees. Independent contractors cannot incur benefits; (4) the amount of recovery is not limitless. Rather, recovery cannot constitute more than one-half to two-thirds of the worker's weekly wage; (5) statutory coverage extends to dependents; (6) those who accept workers' compensation benefits cannot seek tort remedy against their employer; (7) injured parties and dependents may sue third persons. However, if the plaintiff is awarded compensation, then the funds must be used to repay the employer for any prior compensation; and (8) employers must have either private insurance or a state fund by which they can guarantee payment of the awarded benefits.[13] While workers' compensation laws vary somewhat from state to state, this article generalizes based on these shared characteristics.

As the preceding provisions imply, workers' compensation is a system governed by requirements and specificity. Obviously not all workplace injuries can be covered under the system. Eligibility is based on certain requirements. First, the employee must suffer from an "injury."[14] While the definition of what constitutes an injury originally included only physical injuries, it has been expanded to include mental and emotional distress.[15] However, the mental or emotional distress that courts are most likely to declare deserving of compensation is that which stems from an injury that also impairs a person's physical functioning, such as

12. *See* 1 LARSON'S, *supra* note 9, ch. 1 § 1.01.

13. *See* Agricultural Ins. Co. v. Focus Homes, Inc., 212 F.3d 407 (8th Cir. 2000). Several female employees sued Focus Homes after they were raped at work. The parties settled in binding arbitration. Focus Homes then appealed to its insurance company to help in payment resulting from the suit. The insurance company claimed that it had no duty to defend or indemnify the insured parties. The court ruled in favor of the plaintiffs. Thus, while employers must guarantee payment, their insurance company may not be required to reimburse.

14. *See* Davis, *supra* note 2, at 421.

15. *See id.* Davis attributes the inclusion of mental and emotional distress to advancements in medical science. Unlike medical communities of the past, today's professionals support the assertion that psychological distress can cause bodily pain and impair one's abilities.

an inability to move one's arm or leg.[16] This is problematic because the inclusion of mental and emotional distress damages is important for rape victims.[17] As we will discuss, rape victims often suffer from such "invisible injuries" as depression, heightened anxiety, or social withdrawal.[18]

Once it has been established that the employee did suffer an injury, then the employee must prove that the injury "arose out of and in the course of employment."[19] The purpose of this requirement is to discover the cause,[20] time, and

16. *See generally* 3 LARSON'S, *supra* note 9, ch. 56. *See also* Timothy Glynn, *The Limited Viability of Negligent Supervision, Retention, Hiring and Infliction of Emotional Distress Claims in Employment Discrimination Cases in Minnesota*, 24 WM. MITCHELL L. REV. 581, 627 (1998).

17. *See* Davis, *supra* note 2, at 421. Even rape victims who do suffer physical injury have been denied workers' compensation. In instances of rape that resulted in physical injury to sex organs, plaintiffs have been denied coverage because the injury did not impair their ability to perform work related tasks. Davis cites several cases for which this exception to the physical injury rule has been held. *See, e.g.*, Imrich v. Industrial Comm'n., 474 P.2d 874 (Ariz. 1970); Renteria v. County of Orange, 82 Cal. App. 833 (1978); Grice v. Suwanee Lumber Mfg. Co., 113 So. 2d 742 (Fla. Dist. Ct. App. 1959).

18. *See infra* notes 129-44 and accompanying text; *see also infra* note 94.

19. *See generally* 1 LARSON'S, *supra* note 9, chs. 3, 12.

20. *See* Katz, *supra* note 10. In the case of sexual assault, showing that the employee was placed under greater risks while at work can fill the causality requirement. *See, e.g.*, Williams v. Munford, Inc., 683 F.2d 938 (5th Cir. 1982); Employers Ins. Co. v. Wright, 133 S.E.2d 39 (Ga. App. 1963); Rush-Presbyterian-St. Luke's Medical Ctr. v. Industrial Comm'n, 630 N.E.2d 1175 (Ill. App. Ct. 1994); McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830 (Minn. 1995); Doe v. South Carolina State Hosp., 328 S.E.2d 652 (S.C. Ct. App. 1985).

The causality requirement is also concerned with who the rapist was in relation to the employer. Trial outcomes vary depending on whether the rapist was a supervisor, a fellow employee, or a third person. Case law shows that it is difficult to prove that sexual assault by an employee's supervisor arose out of employment. *See, e.g.,* Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887 (D.C. Colo. 1982); Doney v. Tambouratgis, 587 P.2d 1160 (Cal. 1979); Murphy v. ARA Services, Inc., 298 S.E.2d 528 (Ga. App. 1982); Knox v. Combined Ins. Co., 542 A.2d 363 (Me. 1988); Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277 (Tenn. 1999) (finding that sexual assault by a supervisor is not compensable under Tennessee's Workers' Compensation Act).

A sexual assault by a fellow employee, if found to have arisen out of personal motives, is not compensable under workers' compensation. *See, e.g.,* Tolbert v. Martin Marietta Corp., 621 F. Supp. 1099 (D.C. Colo. 1985); Ward v. General Motors Corp., 431 A.2d 1277 (Del. Super. Ct. 1981).

Victims of sexual assault by a third person have been successful in winning compensation if the conditions of employment created substantial risk. *See, e.g.*, Williams v. Munford, Inc., 683 F.2d 938 (5th Cir. 1982); Rush-Presbyterian-St. Luke's Medical Ctr. v. Industrial Comm'n, 630 N.E.2d 1175 (Ill. App. Ct. 1994); Giracelli v. Franklin Cleaners & Dyers, Inc., 42 A.2d 3 (N.J. 1945); Beck v. State, 779 S.W.2d 367 (Tenn. 1989). In *Rush-Presbyterian*, two men who were not employed at the hospital raped a hospital employee. Though the men were never apprehended, remarks they made to the victim indicated that they wanted to rape a nurse. Though

place[21] of the injury.[22] For the injury to be compensable, all three elements must be somehow connected to the workplace — a cause and effect relationship between the injury and the working environment must be established.[23]

If the employee establishes that he or she suffered an injury as a result of workplace conditions, the court must next determine the amount of the award. Each jurisdiction uses equations based on precalculated averages[24] to determine both the amount of time that an injury would keep an employee from work[25] and

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the victim was not actually a nurse, she was dressed in an all-white uniform similar to that worn by nurses. Due to these statements and other supporting evidence, the court ruled that the victim's employment placed her at greater risk for being raped than if she were not at work. The court found that the plaintiff suffered debilitating mental injuries that prevented her from returning to her position at the hospital. Thus, she was awarded coverage under workers' compensation. *See* Rush-Presbyterian-St. Luke's Medical Ctr. v. Industrial Comm'n, 630 N.E.2d 1175 (Ill. App. Ct. 1994).

21. *See* Katz, *supra* note 10.

> [T]he requirement that the injury occur in the course of the employment refers to whether the injury occurs during the period of employment, at a place where the employee reasonably may be in the performance of his duties, and while the employee is carrying out an activity which is in furtherance of the employer's business or incidental thereto.

Id. at 735-36.

Katz notes five common locations for sexual assault victims trying to claim workers' compensation. These categories include, the premise inside the place of employment, the parking lot, the streets within close proximity to the place of employment, housing supplied by the employer, and travel for work-related purposes. Rulings for such cases vary depending on other circumstances. Courts are often concerned with whether the employee was benefiting the employer at the time of the assault.

22. *See* Davis, *supra* note 2, at 422. The interpretation of this requirement has been fairly liberal. For example, workers injured while driving from work to a nearby parking lot have been awarded compensation. *See, e.g.,* Howell v. Cardinal Indus., Inc., 497 N.W.2d 709, 712 (S.D. 1993). However, courts do not have tolerance for injuries arising out of personal matters and thus not pertaining to the workplace environment. *See* Davis, *supra* note 2, at 423.

23. *See* Katz, *supra* note 10.

24. *See* Davis, *supra* note 2, at 419.

> [W]orker's compensation systems utilize averages: on the average, what do workers in this state make per week; on the average, how long are they off work for various kinds of injuries; on the average, how much support does a child need until the age of eighteen; on the average, how much of a worker's earning are absolutely required to keep him/her off welfare?

Id.

25. *See id.* at 421. Once the length of time established for recovery has expired, then the employee stops receiving compensation, regardless of whether he or she is fully recovered.

the amount of monetary compensation the employee is entitled to receive.[26] This generalized system negates the importance of individual circumstances. All injuries are forced to fit within the dictates of the compensable schedule. Courts are generally not concerned with the intensity of the injury or the specifics of the injured person's life. Courts award only the generic amount of compensation so as to keep the worker from destitution.[27]

Just as the limited nature of recovery is often recognized as a serious flaw in the workers' compensation system, so too is the system's exclusivity doctrine.[28] The exclusivity doctrine prohibits workers whose injuries are covered by the workers' compensation system from seeking other legal avenues of redress against the employer.[29] This prohibition applies regardless of whether the worker is awarded compensation. Thus, whenever an individual chooses to seek redress through workers' compensation, he or she is automatically prohibited from filing civil charges against the employer.[30]

The exclusivity doctrine, like precalculated averages, generalizes all injuries in the sense that the law fails to consider that some injuries may not only decrease one's job capabilities, but also cause severe disruption in one's personal life. This doctrine is particularly damaging for rape victims because their workplace injuries are likely to have more far-reaching and longer effects than a broken ankle or sprained back.[31] Yet, under workers' compensation law, a raped worker generally cannot collect compensation for the complex effects of the injury.

Frustrated by the limited recovery of workers' compensation, rape victims have argued that because the infliction of their injuries was intentional, then the employer should no longer be protected from tort action. Their arguments are often based on

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26. *See id.* at 420.

27. *See id.* at 419.

> [U]nder workers' compensation, the claimant has neither the chance to be made whole nor the chance to have her own needs considered. Rather, she is limited to recovering an average of earnings of a statewide group 'covered workers,' an average of what is needed for survival by the group 'covered workers.'

Id.

28. *See id.* at 425-26.

29. *See* 6 LARSON'S, *supra* note 9, ch. 100 § 100.01.

30. *See id.*

31. *See* Davis, *supra* note 2, at 426. Most state and federal courts do agree that rape at the workplace is covered by workers' compensation. Thus, in most jurisdictions tort recovery for the rape victim is prohibited.

several exceptions to the exclusivity doctrine.[32] First, certain jurisdictions allow employees to bring tort action against the employer if the employer's conduct was intentional. Intentional tort actions that may be available to the worker include assault, battery, and intentional infliction of emotional distress. Another remedy available in some jurisdictions is to hold the employer negligent for permitting an employee with a background of sexual offenses to remain in the workplace.[33]

In most jurisdictions, however, rape victims are prevented from seeking a tort remedy against the employer due to the exclusivity doctrine and the doctrine of respondeat superior.[34] This doctrine permits attribution of the employee's intentions to the employer if the employee was "acting within the scope of his employment."[35] This argument often wins, thus barring a rape victim's access to tort recovery and making her sole remedy workers' compensation.

In summary, two assertions about the workers' compensation system can be made: (1) the system furnishes workers with necessary protections and encourages employers to be concerned for their workers' safety; and (2) the system is flawed in the sense that it generalizes injuries. The best way to handle certain workplace injuries, such as rape, is unclear and left for idiosyncratic interpretation.

With this legal foundation, let us now consider the application of workers' compensation to rape in the workplace.

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32. *See id.* at 427; *see also* Katz, *supra* note 10.

33. *See, e.g.,* Bean v. Directions Unlimited, Inc., 609 N.W.2d 567 (Mich. 2000). In *Bean*, the court of appeals found the defendant guilty of negligent hiring and supervision because they kept an employee who had a known history of sexual misconduct. The Supreme Court of Michigan reversed this decision and ruled in favor of the defendant. *But see* Glynn, *supra* note 16, at 633. Glynn advises against using theories of negligence against an employer unless physical injury has occurred or been threatened. These theories are more limited than commonly perceived, according to the author.

34. *See* Davis, *supra* note 2, at 427; *see also* Glynn, *supra* note 16, at 585-586. Glynn notes that doctrine of respondeat superior is mistakenly equated with negligent supervision. What distinguishes respondeat superior claim from negligent supervision, is that the former requires no negligence on the part of the employer. *See id.*

35. Davis, *supra* note 2, at 427. Davis also cites several cases in which the court found that the rapist was acting within the scope of employment when the rape was committed. *See, e.g.,* Rabon v. Guardsmark, Inc., 571 F.2d 1277, 1279 (4th Cir. 1978); Hallett v. United States, 877 F. Supp. 1423, 1428 (D. Nev. 1995); Guzel v. State of Kuwait, 818 F. Supp. 6, 10-11 (D.D.C. 1993); Aaron v. New Orleans Riverwalk Ass'n, 580 So. 2d 1119 (La. Ct. App. 1991).

III. Overview of Rape and Workers' Compensation Case Law

The following cases provide a sample of those in which the female plaintiff, who had been raped in the workplace, attempted to seek some remedy other than that made possible by filing a workers' compensation claim. A state district court, and then the state court of appeals, heard most of the cases. Typically, summary judgment was granted to the defendant-employer at both levels.

A. *Doe v. South Carolina State Hospital*[36]

Doe, an employee in the South Carolina State Hospital, was raped by an escaped mental patient during her work shift.[37] She suffered both physical and mental injuries, and received workers' compensation benefits for her physical injuries, although she did not file for them.[38] Doe tried to recover a tort remedy for her mental injuries with the following arguments: (1) she argued that her mental injury did not arise from her work, because none of her duties brought her into contact with her assailant;[39] and (2) she claimed that the mental injury fell outside the scope of the Workers' Compensation Act,[40] i.e., mental trauma is not a "disability" compensable by workers' compensation. The trial court denied her claims,[41] granting summary judgment in favor of the employer, and upon her appeal summary judgment was affirmed in 1985.[42]

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36. 328 S.E.2d 652 (S.C. Ct. App. 1985).

37. *See id.* at 654.

38. *See id.*

39. *See id.* at 656.

40. *See id.*

41. *See id.* at 658. As stated by Chief Judge Sanders,

> [a]ppellant, in essence, argues that the additional mental trauma and humiliation which she has incurred as a result of this attack upon her may be segregated from the physical harm and compensated for in this tort action. . . . '[T]he essence of the impact of rape' is not the physical injury, but mental trauma.

Id. at 656. Chief Judge Sanders dismisses her argument for the following reasons: "it is fundamental that if an accident arising out of and in the course of employment results in physical injury or trauma, and additionally, mental injuries are caused by the same accident, the remedy for all injuries lies solely under the Workers' Compensation Act." *Id.*

42. *See id.* at 653.

B. *Rathbun v. Starr Commonwealth for Boys*[43]

Rathbun was an employee for the Starr organization, which housed boys who were in the custody of the Department of Social Services.[44] She was raped by Williams, another employee. Rathbun alleged that her coworkers allowed Williams, who had been convicted of a second-degree sexual conduct violation, to pass the screening and work at Starr. She contended that the rape did not arise out of the course of her employment, rather out of the defendants' failure to follow established policy.[45] The court dismissed this claim, arguing that the injury occurred while she was lawfully on the premises of her employment, doing the job she was assigned to do, at the time when she was assigned to do it, making workers' compensation her exclusive remedy for the rape.[46]

The analysis by the court is precisely the form of analysis we expect in a workers' compensation case. Victims' claims of negligence are ignored because they arise from tort liability claims. To the court, rape victims who were on the job, performing their assigned tasks, signals workers' compensation remedies exclusively.

C. *Tolbert v. Martin Marietta*[47]

Tolbert, a secretary for Martin Marietta, was raped by a coworker with whom she had no personal, nonwork related contacts, as she was going to the cafeteria on her lunch break. Because her coworker had a record of past behavior indicating that he might assault or rape, the victim argued that her employer negligently hired the assailant, and negligently failed to make the workplace reasonably safe for employees.[48] Applying the positional risk test,[49] the court ruled that her injury would not

43. 377 N.W.2d 872 (Mich. Ct. App. 1985).
44. *See id.*
45. *See id.* at 876.
46. *See id.*
47. 621 F.Supp. 1099 (D.C. Colo. 1985).
48. *See id.* at 1100.
49. *See id.* at 1101. The court notes the following definition of positional risk by Larson:

> An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. . . . This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which *the only connection* of the employment with the injury is that its obligations placed the employee in

have occurred but for her employment, which made workers' compensation her exclusive remedy. Summary judgment was granted and, upon appeal, affirmed in 1988.[50]

The outcome of the *Tolbert* case is typical for a workplace rape case. The victim makes an argument using a tort theory and the court ignores the victim's claim, focusing instead on workers' compensation. The court relies on the traditional language of workers' compensation law to argue that the injury is an extension of workplace activity. As such, the court tells the victim that her remedy must be found, if at all, under the workers' compensation umbrella.

D. *Ford v. Revlon*[51]

Ford, an employee in the purchasing department at Revlon, suffered harassment by her supervisor, Braun.[52] On at least two occasions, Braun told Ford that he was going to have sex with her and physically restrained Ford on one of those occasions.[53] Ford reported these incidents to Revlon management, however, it took Revlon a year and a month to issue a letter of censure to Braun.[54] Ford developed "high blood pressure, a nervous tic in

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> the particular place at the particular time when he was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment.

Id. (emphasis added) (citing 1 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW ch. 3 § 3.05).

50. *See id.* Upon concluding, the opinion reads:

> We recognize that this ruling may seem to produce an unfair result, in the respect that Tolbert is now barred from bringing a civil action against Martin Marietta. While not unmindful of the dilemma, it must be noted that '[t]he Workmen's Compensation Act should be given a liberal construction because its purpose is highly remedial and beneficent.'

Id. The logic here is fascinating because the opinion seems to assume that the alternative that it thereby barred will be less remedial and beneficent.

51. 734 P.2d 580 (Ariz. 1987).

52. *See id.* at 582.

53. *See id.* at 583. The first incident occurred when Braun invited Ford to a business dinner. When Braun tried to leave, Ford "told her that she was not going anywhere and to sit down because he planned to spend the night with her." *Id.* When Ford refused Braun, Braun said "you will regret this." *Id.* A month later, Braun followed Ford around at a company picnic. When Ford was leaving the restroom, "Braun grabbed Ford and restrained her in a chokehold with his right arm, pulling Ford back a few steps. Braun ran his left hand over Ford's breasts, stomach, and between her legs." *Id.* Ford was freed only when her friend pulled Braun's arm enough so that Ford could get away. *See id.*

54. *See id.* Ford contacted numerous people at higher levels at Revlon. At one point, the manager of human resources told Ford that "the situation was too hot for

her left eye, chest pains, rapid breathing,"[55] felt "weak, dizzy, and generally fatigued," and eventually attempted suicide.[56] Ford sued both Braun and Revlon for assault, battery, and intentional infliction of emotional distress.[57] Braun was found liable for assault and battery, however, Revlon was liable only for intentional infliction of emotional distress.

Revlon appealed the decision, arguing that because Braun, as an agent, was not liable for intentional infliction of emotional distress, Revlon could not be found guilty as the principal.[58] Furthermore, Revlon argued that the Arizona workers' compensation laws instead of tort law controlled Ford's claim.[59] The Supreme Court of Arizona determined that Revlon could be and was found liable for intentional infliction of emotional distress.[60] And, the court ruled that workers' compensation law did not control Ford's claim, largely because the court determined that the act committed by Braun and Revlon were not "accidents."[61]

This decision is particularly important because it shows one argument that successfully took rape at work beyond the awkward confines of workers' compensation law. This court interpreted the workers' compensation statutes as protecting against particular kinds of *accidents*. But when the harm results from an *intentional* action, that should no longer fit within the pattern of workers' compensation cases and damages should be provided by tort remedies.

E. *King v. Consolidated Freightways Corp. of Delaware*[62]

Consolidated Freightways employed King as a billing clerk. Her manager repeatedly harassed her in an offensive and sexual manner.[63] King and other plaintiffs filed a Title VII action, alleging assault, battery, intentional infliction of emotional distress, and invasion of privacy. Citing the opinion of the courts in *Byrd*

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her to handle and that she did not want to get involved." The manager suggested that Ford "put the matter in the back of her mind and try to forget the situation." *Id.*

55. *Id.*
56. *Id.*
57. *See id.*
58. *See id.* at 584.
59. *See id.* at 586.
60. *See id.* at 585-86.
61. *Id* at 586.
62. 763 F. Supp. 1014 (W.D. Ark. 1991).
63. *Id.* at 1015.

v. Richardson-Greenshields Securities, Inc.[64] and *Ford v. Revlon,*[65] the court reasoned that the law should not view sexual harassment as a risk inherent in the workplace environment.[66] Moreover, public policy demands that employers "be held accountable in tort for the sexually harassing environments they permit to exist."[67] Furthermore, the court enumerated the differences between general workplace injuries and rape.[68] The court denied partial summary judgment, ruling instead that King's claim is neither covered by nor barred from the Workers' Compensation Act.[69]

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64. 552 So. 2d 1099 (Fla. 1989). The court in *Byrd* addressed the question of whether the state's workers' compensation statute provided the exclusive remedy for a workplace sexual harassment claim. *See id.* at 1100. The court continued:

> [W]orkers' compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than is addressed by sexual harassment laws. While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self-esteem. Workers' compensation addresses purely economic injury; sexual harassment laws are concerned with a much more intangible injury to personal rights.

Id. at 1104.

65. 734 P.2d 580 (Ariz. 1987).

66. *King*, 763 F. Supp at 1017. The court, citing the *Byrd* opinion, asserts that "sexual harassment should not and cannot be recognized as a 'risk' inherent in any work environment." *Id.*

67. *Id.* (citing *Byrd*, 552 So. 2d at 1104). As the following quote demonstrates, *Byrd* marks a radical digression from the way that courts have treated and continue to treat issues of sexual harassment and sexual assault. Far from excusing its verdict as the inevitable exception to the beneficence of workers' compensation, the *Byrd* court in its opinion takes a proactive position:

> There can be no doubt at this point in time that both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment. The statutes, case law, and administrative regulations uniformly and without exception condemn sexual harassment in the strongest possible terms. We find that the present case strongly implicates these sexual harassment policies and, accordingly, may not be decided by a blind adherence to the exclusivity rule of workers' compensation statute alone.

Id.

68. *See id.* at 1014. The court stated:

> [W]orkers' compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than is addressed by sexual harassment laws. While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self-esteem. Workers' compensation addresses purely economic injury; sexual harassment laws are concerned with a much more intangible injury to personal rights.

Id.

69. *Id.* at 1017.

The above cases reflect the diversity of treatment of rape in the workplace environment. There seem to be two lines of cases marked by judicial passivism versus judicial activism. *Doe*, *Rathbun*, and *Tolbert* are representative of cases where judges may feel required to restrict a rape victim's remedy to that provided by workers' compensation regardless of how much they might want to further compensate rape victims. On the other hand, the opinions of the *Byrd*, *Ford,* and *King* courts are representative of judicially active courts willing to permit tort remedies.

IV. LEGAL INSENSITIVITY TO RAPE

> *Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is . . . straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.*[70]

Because rape is a gender-based crime,[71] happening almost exclusively to women, relying on the reasonable person standard is problematic. In cases of rape, the reasonable person is the reasonable woman, and in the absence of a female legal construction of what a reasonable woman would do, men determine what they believe women should do, and naturalize it with the reasonable person standard.[72]

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70. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (James H. Chadbourn rev., 1970). Wigmore adds that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." *Id.*

71. *See generally* Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. REV. 1281 (1991). Unlike many other behaviors that are criminalized, rape is primarily an action by one sex against the other sex. The rapists are almost always men; the rape victims are almost always women.

72. *See* Luis T. Garcia, *Perceptions of Resistance to Unwanted Sexual Advances,* 10 J. PSYCHOL. & HUM. SEXUALITY 43 (1998); *see also* Judith E. Krulewitz, *Sex Differences in Evaluations of Female and Male Victims' Responses to Assault*, 11 J. APPLIED SOC. PSYCHOL. 460 (1981). One hundred fifty-four participants (84 female and 70 male) were read accounts of either a male or female being attacked by a male. In some of the narratives the victims responded by physically resisting. In

This failure to respect the role of gender in shaping perspective[73] is fundamental to many of the problems feminist scholars have noted in rape law.[74] Men rarely experience rape. Men do not live with the threat of rape, sexual harassment, and sexual assault.[75] The resulting lack of empathy for crimes predominantly against women contributes to legal judgments that ground our law in questionable assumptions about women's behavior in sexual situations. A most basic and compelling point regarding rape law's bias against women is suggested in the very fact that rape cases are treated as if they require special scrutiny. Juries in some states are cautioned that "the charge [of rape] is one which is easily made and difficult to defend against," instructing juries to view the plaintiff's testimony with caution.[76]

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others, the victim did not resist at all. When asked to anticipate the outcome of the situation, the women believed that those who physically resisted would most likely be raped. Men, on the other hand, believed that rape would be the least likely when the victim resisted. Women also felt that the victims that did not resist would have the most favorable outcomes, where as men believed the contrary to be true. These findings help explain why women and men respond differently to physical assaults. If women believe that their situation will be made worse by resisting, then they are obviously less likely to physically resist.

73. See LORRAINE CODE, WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE 2-4 (1991) for a discussion of the historical tendency to act as if there is a universal perspective from which the true meaning of reality is gleaned. Thus, the question of who the actor may be and who was acted upon is irrelevant. Code's book is especially strong in highlighting the existence of a female perspective.

74. *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 103-33 (1999). Taslitz argues that rape trials can be considered market failures because the trials reinforce gender bias. Gender significantly affects various spheres of life. For example, see generally DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990), and DEBORAH TANNEN, THE ARGUMENT CULTURE: STOPPING AMERICA'S WAR OF WORDS (1999). Tannen argues that women and men use language very differently. Men are much more likely to use language to get what they want. In contrast, women are more likely to try to use language to cooperate and build relationships.

75. When the foreseeability doctrine is used to combat charges of rape, the inexperience of men with rape becomes especially relevant. *See generally* Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents,* 69 CHIC.-KENT L. REV. 313 (1993). The authors argue that the acquittal in *Doe v. Linder Construction Co.*, 845 S.W.2d 173 (Tenn. 1992), on the basis of "unforeseeability" derived from a male conception of what is and what is not foreseeable. They argue that if the manager at Linder Construction had been female, rape in a housing complex as a result of improperly secured keys would be foreseeable.

76. *See* BATTELLE LAW AND JUSTICE STUDY CENTER, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS 3 (1977) [hereinafter BATTELLE]; *see also* Morrisson Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1045 (1990).

A second instance of exaggerated caution surfaces in the Model Penal Code's requirement of prompt complaint,[77] stating that a statute of limitations is necessary to protect men from false charges of rape or sexual assault.[78] Though reminiscent of Wigmore's attitude toward women and rape, the Model Penal Code expresses "a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant."[79]

Torrey notes that until July 1975, California judges were required to give the following cautionary instructions to juries in rape trials:

> A charge such as that made against the defendant in this case is one which is easily made, and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.

Id.

77. *See* Reeves v. Daley, No. 97-1126, 1998 U.S. Dist. LEXIS 20108 (E.D. La. Dec. 16 1998).

78. MODEL PENAL CODE § 213, cmt. at 421 (1980); *see also* Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES OF SEXUAL BEHAV. 81 (1994). False allegations of rape have been made for centuries. However, the reasons for why women make these allegations have varied. It was once thought that false rape accusations were due to a unique condition of women similar to kleptomania. Legal scholars of the mid-20th century referred to false rape allegations as "pseudologia phantastica," which was a delusional state in which the complainant truly believes that she had been raped although no rape, and perhaps no sexual contact of any kind, had taken place." Kanin, *supra*, at 82. More recently, feminists have brought to light the suggestion that false rape reports are actually defense mechanisms used by women to deal with underlying emotional and social problems. Other feminists are more extreme in the sense that they deny the possibility that a woman would falsely accuse a man of rape. *Id.* at 83. *See generally* SUE BESSMER, THE LAWS OF RAPE (1984); SUSAN BROWNMILLER, AGAINST OUR WILL (1975); SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS (1933); Carolyn Zerbe, *Counselors and the Backlash: "Rape Hype" and "False-Memory Syndrome,"* 74 J. COUNSELING & DEV. 358 (1996); Sarah Crichton, *Sexual Correctness: Has it Gone Too Far?*, NEWSWEEK, Oct. 25, 1993, at 52-56.

79. MODEL PENAL CODE § 213; *see also* Kanin, *supra* note 78, at 85. Kanin concludes that women are motivated to falsely accuse men of rape because the charges serve one of three functions: (1) to provide a cover for other unsavory behavior; (2) to gain revenge; or (3) to function as a mechanism for receiving sympathy and/or attention. *See id.* Case examples are given for each of these functions. One woman falsely accused a male friend of rape after the two had a physical fight while intoxicated. He had blackened her eye and cut her lip. The woman had a custody hearing for her child in a few days and felt that she needed an explanation for her injuries. Fearing that the truth would hurt her chances of gaining custody, she invented the rape story. *See id.* at 86. One 16-year old girl falsely accused her boyfriend of rape as a form of revenge. Apparently the girl was angry with him because he had been dating another girl at the same time that he was dating her. *See id.* at 87. Finally, a 17-year old female invented a story that she had been raped so as to gain the attention of her mother. She and her mother had been quarreling fre-

Recognizing this differential treatment of women under the law, the legal community has taken several proactive steps toward eliminating practices that reflect and perpetuate normative myths of women's reactions to rape.[80] In New York, for example, the corroboration requirement, which supported the myth that an "honest" woman could not keep an event such as rape to herself, was repealed in 1975, because it was held to be both "groundless" and "discriminatory."[81] Additionally, a rape shield was enacted in 1975, which limits defense attorneys' introduction of information about a woman's sexual history.[82] The rape shield combats the myth that only women with "bad reputations" are

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quently over the girl's lifestyle choice. The girl felt the story of the rape would get her mother "get off my back and give me a little sympathy." *Id.* at 87.

80. *See* TASLITZ, *supra* note 74, at 7-10. "The reforms had these goals: shifting the trial's emphasis from the victim's character to the defendant's conduct, and increasing rape report and conviction rates." *Id.* Taslitz's book considers why the attitudes behind the rape myths still exist. He suggests that juries need to create a story to explain the rape. Consequently, even though the rape reform laws have attempted to dispel the myths surrounding rape, juries still use the myths to explain the rape. For discussions of rape law reform, see generally NANCY A. MATTHEWS, CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE (1994), and MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR (1989). Reforming rape law, or even discussing the matter of rape itself, is difficult when certain definitions cannot be agreed on. For example, the definition of rape myths is ambiguous. *See* M.R. Burt, *Cultural Myths and Supports for Rape,* 38 J. PERSONALITY & SOC. PSYCHOL. 217 (1980). Burt was one of the first researchers to define rape myths as "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists." *Id.* at 217. *But see* Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCHOL. WOMEN Q. 133 (1994). Lonsway and Fitzgerald criticize typical definitions of rape myth, such as Burt's, for their ambiguity. When definitions vary, they create inconsistencies in the understanding of rape myths. In their article, Lonsway and Fitzgerald define rape myths as "attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women." *Id.* at 134.

Rape myths are more than just ill conceived stereotypes. For those who consider them as true, the myths do serve functions. "The belief that only certain types of women are raped functions to obscure and deny the personal vulnerability of *all* women by suggesting that *other* women are raped." *Id.* at 136; *see also* Pat Gilmartin-Zena, *Attitudes Toward Rape: Student Characteristics as Predictors*, 15 FREE INQUIRY IN CREATIVE SOC. 175. People also want to believe in a "just world," in the sense that good things happen to good people and bad things happened to bad people. Thus, people who believe in the just world want the victim of rape to hold some responsibility for the crime. By believing that the victim is responsible, others are reassured of their own security.

81. *See* Dawn M. Dubois, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1094-97, 1103-04 (1988). *See, e.g.*, People v. O'Sullivan, 10 N.E. 880 (N.Y. 1887); Higgins v. People, 58 N.Y. 377 (1874).

82. *See* Dubois, *supra* note 81, at 1104.

raped.[83] Moreover, in 1982, New York repealed the resistance requirement, which had made it necessary for women to "prove earnest resistance." Again, one of the implications of this bygone legislation is, among other things, that for a woman death is preferable to rape, and thus a struggle should occur.[84]

When a rape case is heard before a jury, the mythology of female behavior exerts itself even when the law limits the important factors in rape to consent at the moment of penetration.[85] According to a study conducted to assess the frequency with which the judge and jury disagreed on a variety of legal issues, the jury "weigh[s] the woman's conduct in the prior history of the affair [rape]. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part,"[86] where "contributory behavior" includes hitchhiking, talking with men at parties, and dating.[87]

In most cases of rape, consent to intercourse and intent to rape are not as unambiguous as the jury might assume.[88] The

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83. For a critical evaluation of several "myths" that have historically plagued and continue to plague rape legislation, see Torrey, *supra* note 76, at 1025-31. *See also* RAPE AND SOCIETY 1 (Patricia Serles & Ronald J. Berger eds., 1995).

84. *Cf.* Menachem Amir, *Victim Precipitate Forcible Rape,* 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 493, 495 (1967) (arguing that victim "precipitation, provocation and seduction" are legitimate defenses for rape). *But see* BATTELLE, *supra* note 76, at 2 (noting that if a woman resists her aggressor in rape, the injury was likely to be more severe).

85. *See* BATTELLE, *supra* note 76, at 18-19. Prosecutors list promptness of report, resistance offered by the victim, use of physical force or a weapon, circumstances of initial contact, and the relationship of the victim with the accused among the ten most important factors in filing rape or lesser sexual assault charge and in obtaining conviction. *Id.*; *see also* Carmell v. Texas, No. 98-7540, 2000 U.S. LEXIS 3004, at *1 (May 1, 2000). In *Carmell*, the court invoked a 1997 Texas statute specifying that an alleged sexual offense could not bring a conviction unless the testimony was supported by physical evidence or the victim made an "outcry," which is defined as telling another person about the offense within six months of its alleged occurrence. This statue does not apply, however, if the victim is under 18. In such cases, testimony alone is enough to convict someone of sexual offense. *See id.*

86. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 249 (1966). While this study is clearly dated, it does suggest yet another way in which the cultural internalization of myths of female behavior can contribute to a decision of the defendant's guilt or innocence.

87. *See id.* at 250. Kalven and Zeisel also note that this "rewriting of the law of rape to accommodate the defendant" is occasionally taken to "a cruel extreme." *Id.* at 251. They cite a case in which the forcible rape resulted in the woman's jaw being fractured in two places, but the jury, upon learning that the plaintiff and defendant possibly had intercourse on prior occasions, acquitted the defendant.

88. *See* Laura Hengehold, *Between Rape and "Desired" Sex: Making a More Complex Difference,* 3 J. FOR PSYCHOANALYSIS CULTURE & SOC'Y 3 (1998); Robin

stereotypical rape — an attack by a stranger, the use of physical force, injury to victim, use of weapon, and/or witnesses — constitutes only a small portion of the rapes that occur.[89] Most rapes are far from this stereotypical version, involving intercourse without consent by only one man, whom the woman knows, who does not beat her or attack her with a gun.[90] Police departments and relevant authorities often ignore these nonstereotypical rapes, in part because of the relative ambiguity of consent, and in part because they are so difficult to prosecute.[91] Indeed, in jury trials of these more common rape cases, the judge and the jury disagree on the sentence 60% of the time, the judge finding the defendant guilty, while the jury acquits.[92]

Why though, when the only relevant issue beyond intercourse is consent at the moment of penetration, is there dispute between judges and juries as to the sentencing of an alleged rapist? The statement of one judge in response to the jury's acquittal of a man who *confessed* to rape might suggest a hypothesis:

> In this case of carnal knowledge, if I were called upon to make the decision I would have been compelled to hold him guilty according to the strict interpretation of the law. Yet if he had been guilty, he would have lost his place in society, his wife would have divorced him . . . maybe the jury could look past the confession; the court could not. The jury, not knowing the cold technicalities of the law, could conscientiously bring in this verdict.[93]

The above passage calls our attention to several relevant issues. The incident of the rape was not the only important factor in this case. According to the judge, equally or more important to the jury was the disruption to the life of the rapist that a guilty

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M. Kowalski, *Nonverbal Behaviors and Perceptions of Sexual Intentions: Effects of Sexual Connotativeness, Verbal Response, and Rape Outcome,* 13 BASIC & APPLIED SOC. PSYCHOL. 427 (1992).

89. *See* Susan Estrich, *Is It Rape?, in* RAPE AND SOCIETY 183, 184 (Patricia Searles & Ronald J. Berger eds., 1995).

90. *See generally id.* Estrich defines this type of rape as "simple," for, while the woman clearly did not consent to intercourse, the rapist did not exert extreme force or use a weapon. For a concise explanation of the process by which simple rapes become routinely marginalized in our legal system, see generally Estrich, *supra* note 89.

91. *See id.* at 185-88; *see also* KALVEN & ZEISEL, *supra* note 86, at 253.

92. *See* KALVEN & ZEISEL, *supra* note 86, at 253. Out of a sample of 42 simple rape cases, the judge and the jury disagreed 60% of the time. However, in 64 aggravated rape cases, those in which there is evidence of extrinsic violence, multiple assailants, or when victim and assailant are strangers, the judge convicts while the jury acquits only 12% of the time. *See id.*

93. *Id.* at 279.

sentence might cause. Apparently, whatever disruption the acquitted rapist caused in the life of the victim is less relevant.

The remedies awarded to a rape victim represent a community's relative sympathies and indicate the social norms that existing hegemonic groups prefer. This bias, still existing in the law, helps explain why judges utilize workers' compensation rather than tort remedies. Requiring a woman who has been raped at work to seek remedies exclusively under the workers' compensation trivializes her injury.

V. RAPE AS AN EXTRAORDINARY INJURY

Clearly, rape is no ordinary injury.[94] However, our claim that a particular type of injury is more severe or enduring in its

94. Rape can result in psychological trauma. This trauma can be manifested in many forms, including posttraumatic stress disorder (PTSD), panic attacks, secondary depression, and substance abuse. *See* Beverly M. Atkeson & Karen S. Calhoun, *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. CONSULTING & CLINICAL PSCYHOL. 96 (1982); Ann Wolbert Burgess & Lynda Lytle Holstrom, *The Rape Trauma Syndrome*, 131 AM. J. PSYHIATRY 981 (1974); Dean.G. Kilpatrick et al., *Factors Predicting Psychological Distress Among Rape Victims, in* TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC STRESS DISORDER 113 (C.R. Figley ed., 1985); Heidi S. Resnick et al., *Prevalence of Civilian Trauma and Post-Traumatic Stress Disorder in a Representative National Sample of Women*, 61 J. CONSULTING & CLINICAL PSCHYOL. 984 (1993); Heidi Resnick, *Prevention of Post-Rape Psychopathology: Preliminary Findings of Controlled Acute Rape Treatment Study*, 13 J. ANXIETY DISORDERS 359 (1999); *see also* Sherry A. Falsetti et al., *The Relationship of Stress to Panic Disorder: Cause or Effect, in* DOES STRESS CAUSE PSYCHIATRY ILLNESS 111 (Carolyn M. Mazure ed., 1995).

For additional literature about the intense mental, physical, and emotional effects rape can have on women, see also Nancy D. Brener et al., *Forced Sexual Intercourse and Associated Health-Risk Behaviors Among Female College Students in the United States*, 67 J. CONSULTING & CLINICAL PSYCHOL. 252 (1999), John Briere, *Lifetime Victimization History, Demographics, and Clinical Status in Female Psychiatric Emergency Room Patients*, 185 J. NERVOUS & MENTAL DISEASE 95 (1997), Lisa A. Goodman et al., *Violence Against Women: Physical and Mental Health Effects. Part I: Research Findings*, 2 APPLIED & PREVENTIVE PSYCHOL. 3, 79 (1993), Jenny Petrak et al., *The Psychological Impact of Sexual Assault: A Study of Female Attenders of a Sexual Health Psychology Service*, 12 SEXUAL AND MARITAL THERAPY 4, 339 (1997), and Susan Stepakoff, *Effects of Sexual Victimization on Suicidal Ideation and Behavior in U.S. College Women*, 28 SUICIDE & LIFE THREATENING BEHAV. 107 (1998).

Following rape, symptoms of PTSD are prevalent in many women. These symptoms also persist in a high percentage of women. *See* Barbara O. Rothbaum et al., *A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 3, 455 (1992). The researchers found that 90% of rape victims had symptoms of PTSD two weeks after the rape. Three months after the rape, 50% of the victims still exhibited symptoms of PTSD. *See also* Dean G. Kilpatrick et al., *Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological*

effects requires substantive support.[95] For rape to be treated as an exemption to the workers' compensation statutes demands a heavy burden of proof. In the case of rape, however, this burden can be met.

There is a distinct difference between rape and other workplace injuries. While the consequences of rape are numerous,[96] often painful to the point of being temporarily debilitating, and often resulting in drastic alterations of behavior, the cause and its subsequent injury are largely invisible. On the other hand, typical workplace injuries, such as a sprained wrist, are typically visibly physical injuries. Depending on the circumstances of the act, a rape victim's injury may *include* accompanying physical injuries, which workers' compensation will treat without hesitation.[97]

Impact, 33 CRIME & DELINQUENCY, 479 (1984). In this study, 16.5% of the rape victims continued to suffer from PTSD 17 years after the initial assault.

Finally, rape is an extraordinary injury due to the derisive public perceptions of rape and its victims. Often women are not seen as the victim in the assault, but rather as the aggressor or the instigator. *See* Harriet P. Lefley et al., *Cultural Beliefs About Rape and Victims' Response in Three Ethnic Groups,* 63 AM. J. ORTHOPSYCHIATRY 4, 623 (1993); Jacquelyn W. White, *A Sociocultural View of Sexual Assault: From Discrepancy to Diversity*, 48 J. SOC. ISSUES 1, 187 (1992); *see also* Luciana Ramos Lira et al., *Mexican American Women's Definitions of Rape and Sexual Abuse*, 21 HISP. J. BEHAV. SCI. 236 (1999). The authors assert that some Mexican American groups are "more likely to hold conservative attitudes toward rape, with rape treated as a shameful secret, to be shared only with the immediate family." Ramos Lira, *supra,* at 242. Factors accounting for this include the persistence of gender-typical roles in Mexican American families, religious ideologies, and the veneration of female chastity.

95. WILLIAM B. SANDERS, RAPE AND WOMAN'S IDENTITY (1980) provides the assertion that rape is unusually significant because it does damage to the victim's sense of self, but illustrates the facile nature of the simple claim of extraordinary status for rape. The support for his views is largely anecdotal and consequently unpersuasive. *But see* Rebecca Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-being or Increasing Trauma?* 67 J. CONSULTING & CLINICAL PSYCHOL. 847 (1999). Rape is different from other injuries in the sense that victims are rarely blamed for incurring other injuries as women who have been raped are often blamed. This article notes that symptoms of PTSD actually increase in victims of non-stranger rape when they seek community services, such as legal aid, medical assistance, and counseling. The increase in symptoms is attributed to the community service workers exhibiting victim-blaming behaviors. However, the article's sample size of 102 is relatively small, thereby making it difficult to extrapolate the findings.

96. *See* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy,* 61 OHIO ST. L.J. 1, 16 (2000). Goldfarb contends that rape is a group-based assault. Female rape victims know that they are chosen by their assailant in part because of their sex. Such group-based crimes serve a "terroristic function" in the sense that they cause heightened anxieties in other members of the group. Additionally, Goldfarb asserts that rape as a group-based assault also reinforces the disadvantaged group's subordinate position.

97. *See* Doe v. South Carolina State Hosp., 328 S.E.2d 652 (S.C. Ct. App. 1985).

But the additional, sometimes permanent, disruption of cognition, emotion, and behavior warrants no damage settlement under workers' compensation.[98] Thus, a rape victim's injuries will, by the denial of compensation and/or punishment, effectively be ignored both by the employer[99] and the coworker/rapist.

One of the main differences between rape and more common workplace injuries is the lingering effects on the rape victim's work product and self-confidence. This is evidenced by the fact that rape victims provide the bulk of those who suffer from Post Traumatic Stress Disorder (PTSD).[100] PTSD is marked by certain criteria, including: (1) that the event would result in marked distress to almost anyone; (2) the victim persistently re-experiences the event through, for example, dreams or recollections; (3) the victim avoids stimuli associated with the experience or is uncommonly numb; (4) the victim experiences increased agitation, for example, sleep disturbances or outbursts of anger; and (5) the victim experiences these symptoms for at least one month.[101] Besides PTSD, women who experience sexual assault tend to have difficulty functioning at work for as long as eight months after the incident, even if the assault did not take place at

98. *See id.* at 652. The claimant was employed at South Carolina State Hospital and was assaulted and raped by an escaped patient. She suffered both physical and psychological injuries. Workers' compensation covered her physical injuries and days she missed from work, but her psychological harm was not compensated. She maintained that her injury did not arise from work, nor was it physical per se. The court granted the employer summary judgment, and her appeal was denied.

99. *See* Crist v. Focus Homes, Inc., 122 F.3d 1107 (8th Cir. 1997). A severely autistic and retarded sixteen-year-old male resident of Focus Homes' care facility sexually assaulted three female employees. The women reported the assaults to Focus Homes, but the individuals to whom the incidents were reported belittled the complaints. Though the women described in specific detail the injuries sustained as a result of the assault, the complaints were ignored. Instead of addressing the situation, Focus Homes simply removed the women from their supervisory positions.

100. MARY P. KOSS & MARY R. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS (1991) provides a sensible treatment of the mental health impact of rape. Koss and Harvey note that victims of rape are certainly not alike in their responses, yet generalizations about the differing psychological profiles of rape victims and of those who have never been raped are possible. *See also* Atkeson & Calhoun, *supra* note 94. The purpose of this study was to determine if depressive symptoms in victims of rape were more severe than "normal" depressive symptoms of nonvictims. Results indicate that two months after the rape depressive symptoms are "significantly greater" than those of the nonvictims. The gap between the two groups narrowed at four, eight, and twelve months, but a few victims did remain high on the depressive symptoms scale. *See id.*

101. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247-51 (3rd ed. 1987).

work.[102] In this section, we will examine in more detail how the effects of a rape are very different from the effects of a more common workplace injury, focusing specifically on the following general categories: physical, short-term psychological, long-term psychological, and neurological.

The physical trauma caused by the rape experience is different from physical trauma caused by a more common workplace injury. Rape yields a variety of somatic complaints,[103] including skeletal muscle tension,[104] gastrointestinal problems,[105] and genitourinary disturbances.[106] Physical and psychological injuries that occur in the short term — approximately two to four weeks — correspond to a phase of recovery characterized by extreme disorganization of the victim's life and continuous fear.[107] The physical symptoms discussed above are accompanied by the following psychological reactions: humiliation, embarrassment,

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102. *See* Patricia A. Resick et al., *Social Adjustment In Victims of Sexual Assault,* 49 J. CONSULTING & CLINICAL PSYCHOL. 5, 705 (1981); *see also* Lawrence J. Cohen & Susan Roth, *The Psychological Aftermath of Rape: Long-term Effects and Individual Differences in Recovery*, 5 J. SOC. & CLINICAL PSYCHOL. 4, 525 (1987) (explaining that other effects of rape include social dysfunction and social isolation).

103. *See, e.g.,* Martha R. Burt & Bonnie L. Katz, *Coping Strategies and Recovery From Rape*, 528 ANNALS N.Y. ACAD. SCI. 345 (1988); Peter DiVasto, *Measuring the Aftermath of Rape*, 23 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERVICES 2, 33 (1985); Jeanette Norris & Shirley Feldman-Summers, *Factors Related to the Psychological Impacts of Rape on the Victim*, 90 J. ABNORMAL PSYCHOL. 562 (1981).

104. *See* Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, *in* FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 315, 319 (Duncan Chappell et al. eds., 1977). The category skeletal muscle tension includes soreness and bruising of all contact areas, tension headaches, fatigue, energy loss, "startle reaction," where she is "edgy and jumpy over minor incidents" and noises, and sleep pattern disturbance, consisting of one or more of the following symptoms: screaming in sleep, waking frequently, waking repeatedly at the time when the woman was attacked, and insomnia. For fatigue and energy loss, see also Elizabeth M. Ellis et al., *An Assessment of Long-term Reaction to Rape,* 90 J. ABNORMAL PSYCHOL. 263 (1981), Ellen Frank et al., *Depressive Symptoms in Rape Victims,* 1 J. AFFECTIVE DISORDERS 269 (1979), and Ellen Frank & Barbara Duffy Stewart, *Depressive Symptoms in Rape Victims: A Revisit,* 7 J. AFFECTIVE DISORDERS 77 (1984).

105. *See* Burgess & Holmstrom, *supra* note 104, at 320. Gastrointestinal irritability includes stomach pains, frequent nausea, especially when thinking of the rape, and loss or change of appetite. For eating disturbances, see also Judith V. Becker et al., *Sexual Problems of Sexual Assault Survivors*, WOMEN & HEALTH, Winter 1984, at 5, DiVasto, *supra* note 103, at 34, Frank & Stewart, *supra* note 104, at 78, Frank et al., *supra* note 104, at 268, and Norris & Feldman-Summers, *supra* note 103, at 564.

106. *See* Burgess & Holmstrom, *supra* note 104, at 320. Genitourinary disturbances include vaginal discharge, itching, burning sensation, generalized pain, chronic vaginal infection, and rectal bleeding, and vary in their degree of severity depending on, among other things, the degree of violence of the rape.

107. *See id.* at 318.

self-blame,[108] fear of physical violence,[109] anger, desires for revenge, and fear of death.[110] Most women also tend to experience alterations in mood such as anxiety, fear, and depression.[111]

Rape victims' recognizable long-term psychological disturbances range in duration anywhere from three months to a lifetime.[112] The specific symptoms or disturbances expressed

108. *See* Ronnie Janoff-Bulman, *Characterological Versus Behavioral Self-blame: Inquiries Into Depression and Rape*, 37 J. PERSONALITY & SOC. PSYCHOL. 10, 1798 (1979). Victims of rape often engage in self-blaming behavior. Society generally assumes that self-blaming tendencies are negative psychological responses. Janoff-Bulman points out, however, that there are two types of self-blame, one of which is adaptive, and one of which is maladaptive. The first type of self-blame is "behavioral" and focuses on one's actions. For example, a rape victim who blames herself for having walked home alone is upset with her choice of behavior. This response is different from "characterological" self-blame in which the victim blames herself for being too trusting and naive. Characterological self-blame is more psychologically damaging because it convinces the woman that her attributes contributed to the rape. These attributes are also usually viewed as unchangeable. Behavioral self-blame though is more liberating because it reassures the victim that she is in control of the situation. Additionally, the victim feels better prepared to face a similar circumstance.

Interestingly, this study found that less than one-fifth of 129 rape victims engaged in characterological self-blame. This finding challenges the "view of the masochistic rape victim who perceives herself as worthless." *Id.* at 1806. However, a challenge to the findings raises serious doubts about their validity. The study was conducted among women at a rape crisis center. Women who voluntarily go to these centers are more likely to be women who do not blame themselves characterologically. *See id.* at 1807.

See also Patricia A. Frazier, *Victim Attributions and Post-Rape Trauma*, 59 J. PERSONALITY & SOC. PSYCHOL., 298 (1990); Patricia Frazier & Laura Schauben, *Causal Attributions and Recovery from Rape and Other Stressful Life Events*, 13 J. SOC. & CLINICAL PSCYHOL., 1 (1994); Cheryl Regehr et al., *Perceptions of Control and Long-term Recovery from Rape*, 69 AM. J. ORTHOPSYCHIATRY 1, 110 (1999).

109. *See* Patricia Resick & Monica Schnicke, *Cognitive Processing Therapy for Sexual Assault Victims*, 19 J. CONSULTING & CLINCIAL PSYCHOL. 385 (1992); I. Lisa McAnn et al., *Trauma and Victimization: A Model of Psychological Adaptation*, 16 COUNSELING PSYCHOLOGIST 4, 531 (1988); Mary P. Koss, *The Women's Mental Health Research Agenda: Violence Against Women*, 45 AM. PSYCHOLOGIST 374 (1990). Rape victims experience significant fear and terror as they begin to remember the rape act itself. The feelings become overwhelming and lead the victims to feel out of control.

110. *See* Burgess & Holmstrom, *supra* note 104, at 320.

111. *See* Lois G. Veronen et al., *Treating Fear and Anxiety in Rape Victims: Implications for the Criminal Justice System, in* PERSPECTIVES ON VICTIMOLOGY 148, 149, (W.H. Parsonage ed., 1979). The authors of that piece state that anxiety, fear, suspicion, and confusion are long-term (up to one year and possibly longer) disturbances of rape. *See also* Dean G. Kilpatrick et al., *Effects of a Rape Experience: A Longitudinal Study*, J. SOC. ISSUES, Fall 1981, at 105, 109, 111, 118.

112. *See* Sarah Crome & Marita P. McCabe, *The Impact of Rape on Individual, Interpersonal, and Family Functioning*, 1 J. FAM. STUD. 58 (1995). Some long-term effects include sleep disorders, social isolation, sexual difficulties, and severe depression. *See also* Mary P. Koss & Barry R. Burkhart, *A Conceptual Analysis of Rape*

throughout that time depend on many factors relating to the victim[113] and the rape itself.[114] Despite this variance in response, generalizations about how women respond to rape in the long-term can be made. It is well documented that women undergo dramatic lifestyle changes after experiencing rape.[115] These changes include but are not limited to changing of residence and/or phone number,[116] changing or losing a job,[117] alcohol and/or substance abuse,[118] resumption of previous substance abuse,[119] prostitution,[120] sexual diffi-

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Victimization: Long-term Effects and Implications for Treatment, 13 PSYCHOL. WOMEN Q. 27 (1989). The article provides evidence for rape being an extremely traumatic experience due to its long lasting effects. Long-term depression can result in withdrawal. *See also* McAnn et al., *supra* note 109. Rape victims suffer withdrawal symptoms that can last several weeks to several months.

113. *See* Burgess & Holmstrom, *supra* note 104, at 321. Burgess and Holmstrom cite the following as personal characteristics that together affect the length of time necessary for a woman to fully recover: age, "ego strength," social network support, and the way that people treated her as a victim.

114. THOMAS W. MCCAHILL ET AL., THE AFTERMATH OF RAPE 71 (1979) arguing that the victim's recovery time is largely contingent upon features of the rape, specifically its degree of violence and whether the victim knew her assailant.

115. *See, e.g.*, DiVasto, *supra* note 103, at 34; Ellis et al., *supra* note 104; Pat Gilmartin-Zena, *Rape Impact: Immediately and Two Months Later*, 6 DEVIANT BEHAV. 347 (1985); Frank & Stewart, *supra* note 104, at 78; Gillian C. Mezey & Pamela J. Taylor, *Psychological Reactions of Women Who Have Been Raped: A Descriptive and Comparative Study,* 152 BRITISH J. PSYCHIATRY 330 (1988); Carol C. Nadelson et al., *A Follow-up Study of Rape Victims*, 139 AM. J. PSYCHIATRY 1266 (1982).

116. Burgess & Holmstrom, *supra* note 104, at 322. In their study, 44 of 92 victims of forcible rape changed residence after the rape. Women also commonly changed their phone number to an unlisted number.

117. *See* Ellis et al., *supra* note 104, at 265 (reporting that about half of the women in their study lost their jobs after experiencing rape).

118. *See* Lynn D. Woodhouse, *Women with Jagged Edges: Voices from a Culture of Substance Abuse*, 2 QUALITATIVE HEALTH RES. 262 (1992); *see also* Janet M. Teets, *The Incidence and Experience of Rape Among Chemically Dependent Women*, 29 J. PSYCHOACTIVE DRUGS 331 (1997). In a sample of 60 women, all suffering from chemical dependency, 73% had been raped and 45% were raped multiple times. *See id.* at 333; *see also* LIZ KELLEY, SURVIVING SEXUAL VIOLENCE 188 (1988); DiVasto, *supra* note 103, at 34; Mezey & Taylor, *supra* note 115, at 336; C. Buf Meyer & Shelley E. Taylor, *Adjustment to Rape*, 50 J. PERSONALITY & SOC. PSYCHOL. 1226, 1230 (1986).

119. *See* Ellis et al., *supra* note 104, at 266.

120. *See* Jackie Mac Millan, *Rape and Prostitution*, 1 VICTIMOLOGY 414 (1976). Mac Millan distinguishes between being raped and soliciting sex as a prostitute. When a woman is raped, she has little (if any) control over the situation. She does not take part in the sexual experience. When engaging in prostitution however, the woman is in control in the sense that she solicits the client, sets the terms, and takes part in the sexual experience. Thus, "[p]rostitution is one way that some women use to gain a certain measure of control over their lives." *Id.* at 417. Therefore, women who have been raped may find prostitution satisfying because it allows them to con-

culties,[121] divorce,[122] recurring nightmares,[123] and the onset of traumatophobia.[124]

The final general category of psychological research on women's responses to rape addresses possible neurological damage resulting from traumatic experiences.[125] During and after rape both personality and behavior patterns are disturbed.[126] Consequent persistent revisiting of the neurological pathways associated with the rape cause measurable harm to the victim's

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trol a sexual encounter. *But see* Mimi H. Silbert, *Prostitution and Sexual Assault: Summary of Results,* 3 INT'L J. BIOSOCIAL RES. 69 (1982). Silbert interviewed 200 street prostitutes and found that they are not in as much control of the situation as MacMillan and others suggest. Prostitutes report being assaulted, robbed, victimized, and severely abused while working. Nonetheless, the results of Silbert's questionnaire do indicate a correlation between being raped and turning to prostitution. In the study, 73% of the women had been raped. *See id.* at 71; *see also* KELLEY, *supra* note 118.

121. Sexual difficulties include problems with establishing and maintaining intimacy, "frigidity," terror, panic, and sexual fears. *See, e.g.,* ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: VICTIMS OF CRISIS (1974); Judith V. Becker et al., *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 106 (1982); Judith V. Becker et al., *Level of Postassault Sexual Functioning in Rape and Incest Victims*, 15 ARCHIVES OF SEXUAL BEHAV. 37 (1986); Ellis et al., *supra* note 104, at 265; Shirley Feldman-Summers et al., *The Impact of Rape on Sexual Satisfaction*, 88 J. ABNORMAL PSYCHOL. 101 (1979); Kilpatrick et al., *supra* note 111, at 111; Mezey & Taylor, *supra* note 115, at 336; Norris & Feldman-Summers, *supra* note 103, at 562; *see also* Carol C. Nadelson, *Consequences of Rape: Clinical and Treatment Aspects*, 51 PSYCHOTHERAPY & PSYCHOSOMATICS 187 (1990) (identifying sexual problems as one of the most common long-term effects of rape). *See generally* Anthony Bateman, *Helping the Partners of Rape Victims*, 4 SEXUAL & MARITAL THERAPY 5 (1989). Partners of rape victims can also experience sexual difficulties following the assault.

122. *See* Ellis et al., *supra* note 104, at 265 (noting that of the five married women in her study, four of them became divorced shortly after the rape, two of which were deserted immediately after the assault).

123. BURGESS & HOLMSTROM, *supra* note 121, at 322. Based on their study, 29 of 92 women experienced recurring nightmares. These nightmares often take on one of the following forms: victim is raped again, she sees the rapist again, the rapist threatens her, she challenges the rapist to fight, and/or she kills the rapist.

124. *See id.* at 323-25. Traumatophobia, a term coined by Sandor Rando, was originally used to describe the multiple-phobia complexes that many U. S. war veterans experienced after WWII. It has since been used to describe the same multiple-phobia complexes experienced by victims of other traumatic events. Traumatophobia in rape victims is described as a phobic reaction to a traumatic situation usually tied to the circumstances in which the rape occurred. Women who were raped outdoors develop a fear of being outdoors, and so on. Other phobias include being alone or in crowds, people walking behind them, and sexual phobias.

125. *See* C. Hartman & Ann W. Burgess, *Neurobiology of Rape Trauma, in* RAPE AND SEXUAL ASSAULT III 1 (Ann Burgess ed., 1991); Ann Cartmill & Tim Betts, *Seizure Behaviour in a Patient with Post-Traumatic Stress Disorder Following Rape: Notes on the Aetiology of "Pseudoseizures,"* 1 SEIZURE 33 (1992).

126. *See* Hartman & Burgess, *supra* note 125, at 10.

capacity to memorize. If to recall the memory of the rape is to experience again the fear, anxiety, and helplessness of the rape, the neurological system learns to resist memorizing. A second avenue of neurological research suggests that a single experience of "overwhelming terror" can alter brain chemistry, making people more sensitive to adrenaline surges even decades later.[127]

VI. Rape Victims and Workers' Compensation Statute

Despite the extreme life disruption in all spheres of a rape victim's life, private and work-related,[128] rape continues to be treated by workers' compensation statutes as a psychological injury without physical effect. Taken on its face, such a position seems logical: the woman does not lose an arm or a leg, she has no visible injuries, thus no necessary correlation exists between the rape and loss of earning power. However, to assess her injury as consisting solely of "pain and suffering" or emotional-mental disturbance is highly simplistic. Specifically, in the case of rape it ignores the very real circumstance in which a woman finds herself when she suffers direct psychological and mental injuries that indirectly cause physical disruptions in her life, but from which she cannot collect adequate damages.

As the earlier review of relevant case law suggested, in many states workers' compensation is the exclusive remedy for the psychological and mental injuries that rape victims suffer, but, in the case of rape, coverage entails nothing more than employers' paying for medical bills and psychiatric treatment[129] for the length of the treatment.[130]

Work-related mental and emotional injuries are compensable only under workers' compensation and not tort remedy in

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127. D. Goleman, *Key to Post-Traumatic Stress Lies in Brain Chemistry*, N.Y. Times, June 12, 1990, at B5, *quoted in* Patricia A. Murphy, Making the Connections: Women, Work, and Abuse 52 (1993).

128. Women raped at work or in another familiar place may even experience more trauma than other rape victims. *See* Krulewitz, *supra* note 72.

> [W]omen who have been assaulted in what they had previously perceived as a "safe" context or location, such as their own home or a public building, show more pervasive and enduring disruption of normal patterns and require a longer period of time for recovery than do persons who are assaulted in a more public or less protected environment.

Id. at 652.

129. *See* Peeples v. Home Indem. Co., 617 S.W.2d 274 (Tex. Civ. App. 1981).

130. *See* Miller v. Weyerhaeuser Co., 713 P.2d 643 (Or. Ct. App. 1986); Mountain States Casing Servs. v. McKean, 706 P.2d 601 (Utah 1985).

cases where the psychological injury is the result of a physical injury.[131] Some courts reject this position, though, on grounds that the focus of the investigation should be on another aspect of the case, such as whether the injury was intentional and outrageous,[132] whether the injury was a normal part of the employment relationship,[133] or whether the essence of the injury includes trauma.[134]

However, if the injury is essentially nonphysical, tort remedy is in some cases not barred by workers' compensation.[135] A further exception to the exclusive remedy doctrine has been granted in instances where the acts involved were not a risk, accident, or a normal part of employment, allowing the victim to file a tort claim for intentional infliction of emotional distress.[136] Additionally, court rulings tend to be more willing to grant awards when trauma, resulting in psychoneurosis or psychosis, causes the victim to be physically disabled.[137] The above exceptions and qualifications suggest that, if the long-term physical, psychological, and life-altering consequences of rape were considered as part of the injury, women who are raped in the workplace might be granted either a damage settlement or the option of tort remedy.

Once an injury is classified as compensable under workers' compensation, the damages that the injured worker can obtain

131. *See* Brown v. Winn-Dixie Montgomery, Inc., 469 So. 2d 155 (Fla. Dist. Ct. App. 1985); Davis v. Sun First Nat'l Bank, 408 So. 2d 608 (Fla. Dist. Ct. App. 1981); *see also* McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830 (Minn. 1995). McGowan was the director of the Church's homeless shelter. While she worked at the shelter, a shelter visitor raped her. She sued the Church for negligence, but her claim was denied because Minnesota's Workers' Compensation Act exclusivity doctrine. The court had found that the rape was contributed to by the conditions of employment.

132. *See* McSwain v. Shei, 402 S.E.2d 890 (S.C. 1991).

133. *See* Hart v. National Mortgage & Land Co., 189 Cal. App. 3d 1420 (1989).

134. *See* Miller v. Fairchild Indus., Inc., 876 F.2d 718 (9th Cir. 1989); Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743 (Cal. 1987); Battista v. Chrystler Corp., 454 A.2d 286 (Del. Super. Ct. 1982).

135. *See* Vigil v. Safeway Stores, Inc., 555 F. Supp. 1049 (D.C. Colo. 1983) (applying Colorado law); Broaddus v. Ferndale Fastener Div., 269 N.W.2d 689 (Mich. Ct. App. 1978), *appeal denied,* 403 Mich. 850 (1978).

136. *See* Hart v. National Mortgage & Land Co., 189 Cal. App. 3d 1420 (1989). *See, e.g.,* Johnson v. Motel 6 G.P., Inc., No. C7-96-897, 1996 WL 653978, at *2 (Minn. Ct. App. Nov. 12, 1996). The plaintiff's various negligence claims were not barred by the Workers' Compensation because her rape was not related to her employment.

137. *See* Deziel v. Difco Lab., Inc., 268 N.W.2d 1 (Mich. 1978); Bentley v. Associated Spring Co., 347 N.W.2d 784 (Mich. Ct. App. 1984); Norwin v. Ford Motor Co. 348 N.W.2d 703 (Mich. Ct. App. 1984).

are calculated based on the employee's loss of resources or earning power.[138] Injuries that result in a change of occupation to one that pays less, permanent unemployability due to disability, and wage loss entitle the worker to a damage payment of usually one-half to two-thirds of the employee's wage prior to the injury.[139] If, however, the employee suffers no loss of wage or "earning power" as a result of the injury, i.e., if the wage remains the same or increases, then the employer is not required to pay damages.[140] Exceptions to these general rules are scheduled injuries,[141] and rules establishing a weekly minimum[142] or maximum[143] amount of compensation.

Rape, although its effect is often traumatic and drastically life-altering, frequently does not cause a loss of earning power, and thus does not warrant a damage settlement. Moreover, if the injury is solely compensable under workers' compensation the victim is simultaneously prohibited from seeking a tort remedy.[144]

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138. *See* Providence Washington Ins. Co. v. Grant, 693 P.2d 872 (Ala. 1985); Glazebrook v. Hazelwood Sch. Dist., 498 S.W.2d 823 (Mo. Ct. App. 1973); Mills v. J.P. Stevens & Co., 280 S.E.2d 802 (N.C. Ct. App. 1981).

139. *See* Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264 (Ala. 1984) (describing Alaska's attempt to compensate injured workers at four-fifths their previous wage); Wells v. White, 648 S.W.2d 77 (Ky. 1983) (calculating benefits by multiplying the 66-2/3% of the client's average weekly wage by the percentage of disability); Gothelf v. Oak Point Dairies of New Jersey, 445 A.2d 1170 (N.J. Super. Ct. App. Div. 1982) (using a percent of average weekly wage and length of disability to calculate compensation benefits).

140. *See* Alsbrooks v. Indus. Comm'n, 616 P.2d 929 (Ariz. Ct. App. 1980); Bragg v. Evans-St. Clair, Inc., 688 S.W.2d 956 (Ark. Ct. App. 1985); Ft. Peirce Utils. v. Blotney, 396 So. 2d 852 (Fla. Dist. Ct. App. 1981). The justification for this qualification is that the post-injury wage seems to be indicative of earning capacity. That is, earning capacity has not been diminished, or if it has, not significantly enough to cause an alteration in the employee's wage.

141. Scheduled injuries are confined to loss of member, use of member, or faculty (such as hearing loss). It is argued that earning capacity is irrelevant, and the amount of compensation represents a conclusively presumed loss of earning capacity. *See, e.g.,* International Paper Co. v. Remley, 505 S.W.2d 219 (Ark. 1974); Mims & Thomas Mfg. Co. v Ferguson , 340 So. 2d 920 (Fla. 1976); Gross v. Herb Lungren Chevrolet, Inc., 552 P.2d 1360 (Kan. 1976).

142. *See* Gothelf, 445 A.2d 1170 (fixing minimum payment at 20% of the state's average weekly wage).

143. *See* Alaska Pac. Assurance Co., 687 P.2d 264; Smither v. International Paper Co., 540 So. 2d 760 (Ala. Civ. App. 1989) (establishing a maximum of $220 per week for permanent partial disabilities); Tolson v. Pratt Bros. Coal Co., 574 S.W.2d 920 (Ky. Ct. App. 1978) (holding that a weekly award must not exceed 85% to 50% of state's average weekly wage).

144. *See* King v. Consolidated Freightways Corp. of Del., 763 F. Supp. 1014 (W.D. Ark. 1991); *see also* Jane Byeff Korn, *The Fungible Woman and Other Myths*

This irony has prompted legal scholars to reconsider workers' compensation and the exclusive remedy provision.[145] This reevaluation has revealed several apparent inconsistencies in workers' compensation as it is applied to rape.

Rape is not a risk inherent or necessary to the workplace environment.[146] It cannot be construed, like most workplace injuries, as an accompaniment of industrial production.[147] Also, construing it as such would imply that men cannot control their sexual impulses, thus naturalizing rape as a normal result when women work outside the home and with men in a workplace.[148] Author Jane Korn writes, "[U]nless sexual harassment is the price that women must pay to work outside the home, it must be recognized as an injury different in kind from those contemplated by workers' compensation statutes. To do otherwise is to reward the harasser and to punish the victim."[149]

While we have emphasized the severity and complexity of the harm from rape to differentiate it from other injuries at work, the false naturalization of rape represents another differentiating factor. To go to work in particular industrial settings is to run a

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of Sexual Harassment, 67 TUL. L. REV. 1363, 1384 (1993) (noting that sexual assault and harassment, unlike most workplace injuries, cause psychological harm, but may not cause a physical injury resulting in loss of earnings). A worker who sustains "only non-physical injury, therefore, could find herself in the unfortunate position of being unable to recover any damages because of lack of physical injury." *Id.* (citing Christine L. Sommer, *Workers' Compensation and Company Sponsored Events: The High Cost of Employee Morale*, 39 CLEV. ST. L. REV. 181, 186 (1991)). We want to thank Jane Korn, whose seminal work has largely guided the remainder of this section.

145. *See* Korn, *supra* note 144, at 1384.

146. *See King*, 763 F. Supp. at 1017. The *King* court, citing *Byrd v. Richardson-Greenshields Securities*, Inc., 552 So. 2d 1099 (Fla. 1989), states that "sexual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to which the employee could be equally exposed outside employment." Employees have an expectation of safety in the workplace. They assume that employers are taking steps to meet that expectation. Just as an employer has a special responsibility to protect workers' from dangerous persons in the workplace, so too do schools have a responsibility to protect students. *See also* S.W. v. Spring Lake Park Sch. Dist. No. 16, 592 N.W.2d 870 (Minn. Ct. App. 1999). An intruder to the school raped a young girl in the school locker room. Three school employees noticed this intruder. The employees knew that he was not a student and wondered about the appropriateness of his presence, but none of them asked the intruder to leave. The parents of the rape victim sued the school district for failing to provide basic security for the students. The court ruled in favor of the parents, declaring that the school had a duty to protect students from foreseeable danger.

147. *See* Korn, *supra* note 144, at 1385.

148. *See id.* at 1388-89.

149. *Id.* at 1388.

probable risk of accident, such as limbs caught in machinery. Those risks are the purview of workers' compensation law. But to claim that rape is just another reasonably predictable event arising from the industrial setting is to remove responsibility from the male actors involved in the rape.

In addition, workers' compensation is based upon the assumption that fault is irrelevant for coverage,[150] except in cases of employee or employer intent. In incidents of rape, however, fault is critical. In many cases, unintentional employee negligence is the culprit of workplace injuries, and the often less than adequate workers' compensation settlements serve as an impetus for the worker to improve workplace safety.[151] To ask a rape victim to be more careful in the workplace is, essentially, blaming the victim for the rape.

In short, rape is an exceptional injury both with regard to the nature of the injury and its uncomfortable status within workers' compensation. The inclusion of rape as a covered injury in workers' compensation law is inconsistent with the history and legislative purposes of the statute.

VII. THE SUBVERSION OF THE PURPOSE OF THE ACT

Rape is an extraordinary injury, and thus there is good reason to question its conflation with a typical slip and fall case under workers' compensation law.[152] The law itself is written vaguely enough that courts can reasonably conclude that sexual harassment and rape in the workplace are not exceptions to the

150. *See, e.g.,* Westbrooks v. Workers' Comp. Appeals Bd., 203 Cal. App. 3d 249 (1988); Queen v. Agger, 412 A.2d 733 (Md. 1980).

151. *See* Korn, *supra* note 144, at 1392.

152. An important distinction needs to be made between rapes that occur between a female employee and her employer or an "alter ego" of the employer and rapes that occur between an employee and one of her coworkers. The rape about which we are speaking is the latter. In the case of the former, because the employer cannot simultaneously be guilty by intent for an act, and then use a policy designed to cover workplace accidents to compensate a victim for harm he intentionally inflicted upon her, such instances are considered exceptions to the exclusivity rule. For further clarification, see Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes,* 96 HARV. L. REV. 1641, 1650-51 (1983) [hereinafter *Exclusive Remedy*]. Nor are we concerned that, when an employee rapes a coemployee, he should be held responsible. Such cases already have a significant precedent in the third-party exception to the exclusive remedy doctrine. *See id.* at 1651-52. Instead, as should be abundantly clear, we are arguing that it be possible to hold the employer liable for rapes that occur in his workplace to his employees, i.e., that summary judgment *not* be granted to employers without first allowing the case to be argued in court.

exclusivity doctrine.[153] Indeed, most courts have done so.[154] But some courts have refused to allow workers' compensation be a woman's exclusive remedy.[155] How a court rules is often dependent upon which causal test the judge adopts.[156] What we are arguing here, however, is not for a test whose application leads one to conclude that rape does not fall under the exclusivity doctrine, but rather that these tests should not be applied at all in cases of rape.

Rape is a unique injury in terms of its devastating impact on the victim and its uncomfortable, highly debatable position within workers' compensation law. Women who are raped in their workplaces, then, should have a choice between workers' compensation as a remedy or tort remedy. Besides the evidence supporting rape's status as a unique and extraordinary injury, the context in which workers' compensation statutes were enacted and the purposes for doing so also buttress this argument.[157]

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153. Workers' Compensation Act provides coverage to employees and immunity from torts to employers so long as the following conditions are met:

> a) Where, at the time of the injury, both employer and employee are subject to the provisions of said articles and where the employer has complied with the provisions thereof regarding insurance; b) Where, at the time of the injury, the employee is performing service arising out of and in the course of his employment; c) Where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of his employment and is not intentionally self-inflicted.

Tolbert v. Martin Marietta Corp, 621 F. Supp. 1099 (D.C. Colo. 1985). The condition around which most of the debate revolves is the third, that an injury must "arise out of" and "in the course of" employment. The definition of these two, and the tests used to determine whether the injury is congruent with the definition has yielded conflicting opinions as to whether rape is compensable. *Id.*

154. *See* Zabkowicz v. West Bend Co. Div., 78 F.2d 540 (7th Cir. 1986); Lui v. Intercontinental Hotels Corp., 634 F. Supp. 684 (D. Haw. 1986); Brown v. Winn-Dixie Montgomery, 469 So.2d 155 (Fla. Dist. Ct. App. 1985); Helton v. Interstate Brands, 271 S.E.2d 739 (Ga. Ct. App. 1980); Employer Ins. Co. of Alabama v. Wright, 133 S.E.2d 39 (Ga. Ct. App. 1963); Arnold v. State, 609 P.2d 725 (N.M. Ct. App. 1980); Doe v. South Carolina State Hosp., 328 S.E.2d 652 (S.C. Ct. App. 1985).

155. *See, e.g.,* Pryor v. U.S. Gypsum Co., 585 F. Supp. 311 (W.D. Mo. 1984); Harrison v. Edison Bros. Apparel Stores, 724 F. Supp 1185 (M.D.N.C. 1989); Hogan v. Forsyth Country Club, 340 S.E.2d 116, 124 (1989).

156. *Tolbert v. Martin Marietta Corporation,* 621 F. Supp. 1099 (D.C. Colo. 1985), identifies five causal tests used to determine whether an injury "arises out of" employment: peculiar-risk doctrine, increased-risk doctrine, actual-risk doctrine, positional-risk doctrine, and the proximate cause test.

157. *See* Quiroz v. Ganna Constr., No. 97 C 480, 1998 U.S. Dist. LEXIS 10301 (N.D. Ill. July 6, 1998). A rape victim was denied workers' compensation charges because, according to the judge, if the court were to provide them, then it would undermine the original intention of workers' compensation — to protect the employer from unforeseeable liabilities. In this case, the rapist did not have a history of

The exclusivity doctrine is a *quid pro quo* for employer assumption of liability without fault.[158] The doctrine persuades the employer to pay into the workers' compensation fund by in turn protecting him or her from additional financial burdens resulting from tort actions arising out of the death or injury of an employee. Although courts have interpreted the doctrine broadly,[159] a good case can be made that expanding workers' compensation does not conform to the original purposes of the Workers Compensation Act. A look back into history suggests as much.

Until the turn of the century, workers harmed on the job could seek remedy via common law by claiming negligence; however, the employer almost always won. This unequal outcome in the courts became more of a problem as the frequency of injuries increased: "With industrialism firmly established by the end of the nineteenth century, it became widely accepted that common law doctrines were no longer suitable for governing the employer-employee relationship in cases involving on-the-job injuries — injuries that came to be considered an inevitable byproduct of industrialism."[160]

The impetus for instituting a workers' compensation statute arose out of the discontent of some social reformers with what they saw as the treatment of employees as entirely dispensable and replaceable,[161] and with the recognition that relying on the

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sexual harassment thereby making his actions unforeseeable by the employer. *See id.* at *12.

158. *See* Deborah A. Ballam, *The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights Under State Employment Discrimination Statutes,* 27 AM. BUS. L.J. 95, 105 (1989).

159. *See id.* at 107-113. A test that is frequently used to judge whether rape falls among those injuries covered by workers' compensation is the "but for" test, which states that an injury that results but for employment meets the burden for "arising out of" employment, making the injury compensable. One might ask, what workplace injuries do not occur "but for" employment.

160. *Id.* at 103. See *Borgnis v. Falk Co.*, 133 N.W. 209, 215 (Wis. 1911) for an especially poignant comment on this point. *See also* Guy v. Arthur H. Thomas Co., 378 N.E. 2d 488 (Ohio 1978).

161. See, for example, Seymour D. Thompson, *Under What Circumstances A Servant Accepts the Risk of His Employment*, 31 AM. L. REV. 82, 85-86 (1897), which suggests clearly enough the reformist bent of the inception of workers' compensation:

> I do not want my professional brethren to think for one moment that I balance the life of a railway brakeman against the slight expense to a railway company of blocking its frogs and switches. I should be sorry to have them think that I ever was willing to balance the life of a railway brakeman against the slight expense to a railway company of

common law as a remedy usually proved to be no remedy at all.[162] The intent clearly is the protection of the employee, who

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> building the upper works of its bridges sufficiently high for a brakeman to stand upon the top of his car without coming in contact with them. These are murder-machines; and the rule of judge-made law that holds the servant at all times and under all circumstances, bound to avoid them at his peril, is a draconic rule. It is destitute of any semblance of justice or humanity. It is cruel and wicked. It illustrates the subserviency of the American judiciary to the great corporations .... [I]t puts the wealthy capitalist, corporate or unincorporate, upon the same equality in this respect, as that of the starving laborer, who must carry his meager dinner pail to his employment, no matter how dangerous it may be, in order to get a little food, clothing and shelter for his suffering family .... Those who can reconcile their consciences to the cold brutality of the general rule with reference to the servant accepting the risk, are at liberty to do so; I envy neither their heads nor their hearts.

162. In his seminal work on the history of workers' compensation laws, Epstein quotes the following arguments of Lord Esher, who played a critical role in the development and interpretation of workers' compensation in British law:

> If there were no such contract [workers' compensation], he could not obtain compensation, unless by agreement with his employers, without bringing an action either in the superior court or the county court, and in that action he would be exposed to the risk of being unable to prove that the accident was the result of negligence of some one for whom the company were responsible. The injuries might, for instance, have arisen from concealed defect of machinery not known to the company, or by pure accident not brought about by any negligence on the part of the company's servants. *The burden of proving that it was otherwise would have been on the plaintiff, and that is a burden which often cannot be supported.* Even if the plaintiff were successful in shewing this and obtained judgment, and the defendants had to pay his costs, it is a matter of common knowledge that the plaintiff would have to incur extra costs beyond those he would recover. Such extra costs would have to be paid out of the damages which he would recover; and we all know that in a majority of the cases in which only small damages are recovered those damages are seriously encroached on in meeting the extra costs.
>
> The risk of non-success owing to difficulty of proof, and the risk of obtaining but small advantage from a successful action, are both obviated by this agreement, under which, even if it is clear that there is no legal claim which could be enforced against the company, he is still entitled to compensation.

Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law,* 16 GA. L. REV. 775, 792 (1982) (emphasis added) (citing Clemens v. London and N.W. Railway Co. [1894] 2 Q.B. 482, 489-90).

The *Boggs* court concurs, noting that employees recovered damages in less than 25% of work-related accidents, resulting in workers' subsidization of economic growth. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658-59 (6th Cir. 1979). The "'unholy trinity' of judicially-created employer defenses, assumption of the risk, contributory negligence and the fellow servant rule," had the effect of making negligence virtually impossible to prove, which prompted workers to agree to "exchange a set of common-law remedies of dubious value for modest workmen's compensa-

the statute's creators saw as being in a vulnerable position with respect to the employer under common law remedies.[163]

This intent, the protection of the employee from the employer or the mode of production, while being so integral to the statute's inception, is scarcely perceptible in certain of the courts' rulings today, namely those involving workplace rape. In these rulings, employee protection has become subservient to a second intended purpose — employer immunity from liability — arguably at the expense of the first.[164] In addition to providing workers with compensation for workplace accidents and injuries, the employer is also shielded from financial ruin[165] by mandating that workers' compensation is the exclusive remedy for any workplace injury,[166] permitting only a few exceptions.[167] Work-

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tion benefits schedules designed to keep the injured workman and his family from destitution." *Id.* at 659.

163. In *Boggs*, 590 F.2d at 658, the court states that the dominant purpose of workers' compensation was not the abrogation of common law remedy, but rather providing social insurance to victims of industrial accidents because "the limited rights of recovery available under the common law at the turn of the century were inadequate to protect them." *See Exclusive Remedy*, *supra* note 152, at 1641-42 (stating that the "passage of the original acts occurred largely in response to the plight of the many injured workers left uncompensated by the common law"); *see also* Red Rover Copper Co. v. Industrial Comm'n, 118 P.2d 1102 (Ariz. 1941); O'Brien v. Chicago City Ry. Co., 137 N.E. 214 (Ill. 1922).

164. See, for example, JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 88 (1987), in which the author notes that in Indiana and Texas, employer liability is protected even in intentional liability tort cases.

165. While most employers resisted workers' compensation at its inception, *see, e.g.*, *Boggs*, 590 F.2d at 659, some preferred "the certainty of limited liability" to the "risks of unpredictable tort damages." *See Exclusive Remedy*, *supra* note 152, at 1642; *see also* Ballam, *supra* note 158, at 104-05; Hollywood Refrigeration Sales Co., Inc. v. Superior Court, 164 Cal. App. 3d 754 (1985).

166. Stated quite generally, the purpose of workers' compensation is to provide workers with guaranteed compensation for workplace injuries in exchange for their common law rights against their employer. Common law rights are removed, making workers' compensation the sole or exclusive remedy for workplace injuries and accidents. *See* Williams v. Munford, Inc., 683 F.2d 938 (5th Cir. 1982) (applying Mississippi law).

167. *See generally Exclusive Remedy*, *supra* note 152. Legal exceptions to the exclusive remedy doctrine fall into three categories: dual-capacity, intentional torts, and third-party injuries. Dual-capacity exceptions enable an employee to file a tort claim against her employer when her employer has breached duties associated with another role that the employer fills in the production process (e.g., manufacturer of a part). *See id.* at 1649. Additionally, dual-capacity enables an employee to sue the parent corporation for wrongs committed by a sibling corporation. *See id.* Intentional torts make the employer responsible for intentional injuries in tort action. These injuries are not accidents, nor are they employment related, making tort remedy an alternative to workers' compensation in these cases. *See id.* at 1650. The third exception concerns actions caused by a third party. In these instances, the

ers' compensation thus is a "promise for a promise" situation, in which the employee "promises" to relinquish her common law rights, and the employer "promises" to provide workers' compensation to employees.[168]

That the responsible industry and consumers should bear the costs of production constitutes another expressed purpose of workers' compensation statutes.[169] Because the injuries are seen as an "inevitable accompaniment of industrial production," the costs associated with these injuries "should be borne by the responsible industry and its consumers," not employees or society.[170]

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injured employee is permitted to sue the third party for damages. Double compensation is prohibited. *See id.* at 1651.

168. The opinion of the court in *Boggs v. Blue Diamond Coal Co.* states well the "promise for promise" nature of workers' compensation: "The [Workers' Compensation] Act, like other workmens' compensation laws, grants immunity from common law negligence to an 'employer' covered by the Act .... The immunity is given in exchange for the guaranteed insurance benefits payable to insured employees without regard to fault." *Boggs*, 590 F.2d at 657.

There appears to be something problematic about the "promise for promise" nature of workers' compensation. Because 90% of workers are covered by workers' compensation, the worker scarcely has a choice whether she will promise or not. If she hopes to earn a living, she is in effect forced to surrender her common law rights. That workers' compensation functions to a woman's disadvantage in rape cases, and is a workplace condition about which women have little (often no) choice, make the placement of rape within the boundaries of the exclusivity doctrine still more uncomfortable.

169. *See, e.g.*, Williams v. Munford, Inc., 683 F.2d 938 (5th Cir. 1982) (applying Mississippi law). The *Williams* court opinion supports the assertion that not holding the employer responsible for a workplace injury

> would, in a large measure, defeat the very purposes for which our Workmen's Compensation Act was enacted. Instead of transferring from the worker to the industry or business in which he is employed and then ultimately to the consuming public, a greater portion of the economic loss due to accidents sustained by him arising out and in the course of his employment would ... be transferred to those conducting the business of the employer to the extent of their solvency. There is no logical reason why this class of persons should underwrite the economic loss.

Id. at 940; *see also* Bowen v. Hockley, 71 F.2d 781 (4th Cir. 1934); Industrial Comm'n of Colorado v. Aetna Life Ins. Co., 174 P. 589 (Colo. 1918); Vaivida v. Grand Rapids, 249 N.W. 826 (Mich. 1933); Lewis & Clark County v. Industrial Acc. Bd., 155 P. 268 (Mont. 1916); Tedars v. Savannah River Veneer Co., 25 S.E.2d 235 (S.C. 1943).

170. *Exclusive Remedy*, *supra* note 152, at 1642. A somewhat more cold, economistic way of viewing the inclusion of injury in the cost of the production is exemplified in U.S. CHAMBER OF COMMERCE ANALYSIS OF WORKMEN'S COMPENSATION LAWS 20 (1984). In this government-reported analysis, a chart appears that compares how much various body parts are valued in different states. For example, if one lost a leg at the hip in Massachusetts, then one would be compensated $9,900.

Who bears the cost of industrial accidents is especially important in that it creates incentives for the party or parties who carry the burden of cost.[171] If, for example, the employer bears the entire cost of industrial accidents, then the employer has a strong incentive to ensure workplace safety. However, if the employee is held fully or partially responsible for her injuries, i.e., if she is not fully compensated for her injury, it becomes in her interest to ensure that workplace injuries do not occur.[172]

Here we arrive at the essence of the problem: in cases of workplace rape, the woman is not fully compensated for her injury (or sometimes not compensated at all), placing the incentive on her and not her employer to maintain an adequate level of workplace safety so that rape is prevented.[173] We are left with

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If one lost a leg while working in Washington, D.C. however, the compensation is $116,653. Losing an eye in Connecticut will render compensation in the amount of $81,075, but in Georgia, this total is only $16,875. *Cf.* E.H. DOWNEY, WORKMENS' COMPENSATION 162 n.18 (1924). *Exclusive Remedy* further argues that the employer is better suited to be the party who bears the costs of injury because the employer is able to transfer costs to consumers, among workers in general, and within the industry. *Exclusive Remedy, supra* note 152, at 1647.

171. *See Exclusive Remedy, supra* note 152, at 1646. If all costs are "borne by one party, that party's incentive to reduce its expenses will lead it to take cost-effective safety measures." *Id.*

172. *See Exclusive Remedy, supra* note 152. The author notes that the exclusive remedy doctrine and its various limitations on benefits "combine to create a substantial risk that job-related injuries will leave workers significantly worse off financially than they were before being injured." *Id.* at 1643 (citing Samers & Kelly, *Promptness of Payment in Workers' Compensation, in* 3 RESEARCH REPORT OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE 63, 75-76 (stating that the average wage loss replaced by workers' compensation was 42% in four major cities, and 50-75% of those surveyed were not able to maintain their previous standard of living)). The author further notes that low levels of benefits are often explained by the assumption that if high benefit levels were permitted, workers would "malinger" rather than return to work. *Id.* at 1643 (citing Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation,* 33 VAND. L. REV. 1281, 1321 n.123 (1980)).

A fortiori, the author argues that imposing costs of injury on employees would have a "negligible effect on safety," because the self-preservation instinct is a "built-in incentive to behave safely." *Id.* at 1646. The above, coupled with the loss of earning power, which workers' compensation only partially alleviates, creates significant employee incentives to safety.

173. *See Exclusive Remedy, supra* note 152, at 1647. Taken out of the rape context, the author considers this to be at best ineffective, in that optimal workplace safety is thwarted. The author argues that "by failing to impose the full cost of work-related accidents on employers, the workers' compensation system creates inadequate economic incentives for workplace safety." *Id.* at 1647. Even under the most generous workers' compensation laws, employers bear at most 9% of employee wage loss, whereas current negligence law would transfer 13% of these costs. *Id.* (citing Ashford & Johnson, *Negligence vs. No-Fault Liability: An Analysis of the Workers' Compensation Example,* 12 SETON HALL L. REV. 725, 733-34 (1982)).

the following dilemma: When a woman, raped in the workplace during workplace hours while she was doing her assigned tasks, seeks legal counsel, counsel may advise her of two things: (1) it is highly unlikely that she would be permitted tort remedy. Most likely, her case would be rejected by summary judgment in favor of her employer, meaning essentially that she must simply live with her pain and the violent disruption of her life without adequate compensation, because she cannot receive punitive damages under the current interpretation of workers' compensation legislation; or (2) she should take it upon herself to protect herself and her female coworkers from rape, a responsibility that should not be her responsibility as an employee. The current situation can be summarized as placing the employer behind the ever-expanding shield of workers' compensation, while holding the victim responsible for being raped, or punishing her for her ill fate.

If this depiction is relatively accurate, and the case law suggests as much, we must recognize that regarding this body of cases, the dominant purposes of workers' compensation have been subverted. As stated above, the expressed purposes are three: (1) the protection of the employee from injuries that accompany industrial production; (2) the limitation of the employer's liability in tort; and (3) the transference of the costs of injury from the employee and society to the employer and consumer. In cases of workplace rape, only the second purpose has been upheld.