
SPECIAL ISSUES RAISED BY RAPE TRIALS

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INTRODUCTION

Rape cases reveal core conflicts in the space where evidence, law, and ethics intersect.¹ Such conflicts include the tension between victim protection and the rights of the accused, the challenges attorneys face trying to negotiate the demands of sensitive and emotionally difficult cases, and the role of the law in counteracting stereotypes and bias.

In this essay, I will begin by presenting the cultural milieu surrounding rape allegations, briefly reviewing attitudes towards perpetrators and victims.² Next, I will attempt to capture the legal zeitgeist concerning rape, focusing on two recent phenomena: the reversal of false rape convictions based on DNA evidence and the advent of big-media rape trials involving various celebrities. After establishing this groundwork, I will turn to three separate issues of ethics and evidence that arise regularly in rape trials: (1) naming the victim, (2) shielding the victim's sexual history, and (3) civil

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1. Given the numerous evidentiary questions rape trials raise, including issues of relevance, character evidence, cross-examination of witnesses, privilege, scientific evidence, and psychological expert testimony, a typical rape trial could serve as an evidence primer.

2. The term rape is defined differently by different jurisdictions, sometimes limited to penile penetration. *See, e.g.*, Ind. Code § 35-42-4-1 (2007). My general reference is intended to encompass all sexual assault and sexually deviant conduct against adult women.

Men, particularly those in prison, also are victims of rape and sexual assault. *See generally* Adrian W. Coxell & Michael B. King, *Male Victims of Rape and Sexual Abuse*, 11 *Sexual & Marital Therapy* 297 (1996) (noting that men who were sexually assaulted displayed many of the same emotional and mental health reactions as female victims). However, most rape victims are women assaulted by men, and I will rely on that template. *See* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings for the National Violence Against Women Survey 7* (2006) (17.6% of surveyed women and 3% of surveyed men were raped at some time in their lives); *cf.* Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1306 (1991) ("Sexual assault cannot be treated as gender neutral because sexual assault is not gender neutral.").

Another potentially controversial issue is the use of the term "victim." Some prefer the term "survivor" to emphasize women's agency. Some prefer the term "complainant" or "accuser" to emphasize the presumption of innocence. I will generally stick with victim, which emphasizes the criminality of sexual assault. That these terms are so fraught with uncertainty and political implication provides further evidence of the legal and cultural minefield that rape trials traverse.

settlements of rape charges.³ I will use the fairly recent case of Kobe Bryant, a famous basketball player accused of rape, to illustrate the evidence and ethical issues in all three of these discrete categories.⁴

My examination of the intersection between evidence law and ethics in rape trials demonstrates the limits of the law to effectuate practical change or to transcend, let alone improve, social attitudes. Many have observed that the legal solutions to problems inherent in rape trials, such as rape shield laws and rules against disclosing victims' names, have had only limited effect.⁵ Because the issues raised here implicate entrenched social attitudes, legal solutions are bound to be incomplete. Such beliefs are filtered through a legal system that is structured around competition and legal gamesmanship. Therefore, the defense lawyer's strategy must be understood within the context of social beliefs about rape as transmitted by the adversary system. We can limit evidence, but we cannot legislate

3. Although this essay will focus on selected evidentiary and ethical constraints on defense attorneys, it is worth noting that prosecutors are not immune from murky ethical problems raised by rape trials. One major difference for prosecutors is that they, unlike defense attorneys, have an ethical duty to seek justice. *See* Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(b)–(c) (3d ed. 1993); *see also* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 Fordham L. Rev. 1337 (2007) (discussing the prosecutor's ethical duty to do justice in the context of the Duke lacrosse case). For instance, prosecutors sometimes struggle with prosecutions that arguably lead to unjust results, even though technically the accused has violated the law. The issue of statutory rape is particularly interesting as an example of a potentially unjust rape prosecution because it involves questions of women's agency. Designed to protect underage girls from predatory older sexual partners, statutory rape laws sometimes include less culpable conduct that reflects outdated notions of women's need to be saved from their own sexual impulses. *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 Buff. L. Rev. 703, 721–22 (2000) (arguing that especially for teenage girls there is "gray area between consent and rape"); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 401–10 (1984) (explaining the conundrum for feminists regarding statutory rape and laying out the arguments for the protections statutory rape laws afford women versus the considerations regarding rights of sexual choice and rejection of a sexual double standard).

4. The Kobe Bryant case has served as a template for other legal scholarship. *See, e.g.,* Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, Crim. Just., Summer 2004, at 14 (illustrating the need for reform of rape shield laws); *see also* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 Harv. J. L. & Gender 381 (2005) (using the facts of the Bryant case to examine the issue of the perpetrator's self-deception and the issue of consent).

5. *See, e.g.,* Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 Law & Soc'y Rev. 117, 120 (1991). Not all the reforms around rape involve changes in the law. As part of the feminist attempt to make reporting easier, reformers have successfully lobbied for better training of police and hospital staff as well as the creation of rape crisis centers to provide support and counseling. *See generally* Janice Du Mont, Karen-Lee Miller & Terri L. Myhr, *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 Violence Against Women 466 (2003).

attitudes, and playing upon prejudices, particularly those of the American juror, is the trial attorney's bread and butter.⁶

Therefore, to analyze the role of evidence and ethics in a rape trial, we must understand rape myths and the cultural baggage that comes with our notions of rape.⁷ Also, we must analyze assumptions about victims and perpetrators, men and women, and the chaste and the deviant.

I. CULTURAL ATTITUDES TOWARDS RAPE

Historically, a woman claiming to be a rape victim—the prosecutrix—was treated with suspicion. Any prior sexual activity on her part outside of marriage was deemed to undermine the veracity of her claim and, as a functional matter, diminished her right to control the nature of her sexual experiences. To obtain a rape conviction, the law often required corroboration (hard to find in a crime conducted mainly in secret), and evidence of physical struggle, injury, and prompt outcry. This reflected the general status of women who have been characterized, from the time of the first woman, Eve, as temptresses and liars. The cultural trope of the woman who lies about rape is seen everywhere from the Bible to great works of American literature.⁸

Traditionally, successful rape allegations involved a virtuous, ideally virginal woman, who is attacked by a creepy stranger. As Professor Susan Estrich explained in *Real Rape*,⁹ the stereotype of the real rape victim involves a woman who is behaving cautiously and who stays where she is supposed to be—in a good neighborhood at a reasonable hour.¹⁰ The more the facts deviate from this paradigm—if the woman is sexually promiscuous, behaves incautiously or intemperately, or, perhaps, most importantly, knew her assailant, the more she is seen as “precipitating her own rape, and therefore culpable.”¹¹ The more society blames the victim

6. Andrew E. Taslitz, *Rape and the Culture of the Courtroom* 106 (1999) (“A lawyer who fails to appeal to race or gender bias will start losing cases if biased appeals work with juries.”).

7. Rape myths are empirically untrue, but nevertheless firmly held notions about the incidence and nature of rape. Rape myths are defined as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.” See Morrison 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, 1017–18 (1991) (citing the work of psychologist Martha R. Burt). See generally Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 Hastings L.J. 663 (1998).

8. Potiphar's wife accuses Joseph of rape when he spurns her advances. *Genesis* 39:6–19. A black man is falsely accused of attempted rape by a white woman embarrassed by her attraction to him. Harper Lee, *To Kill a Mockingbird* (1960).

9. Susan Estrich, *Real Rape* (1987).

10. The stereotype persists even though only 16.7% of all female victims were raped by strangers. See Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 Law & Soc'y Rev. 531, 536, 538–39 (1997) (documenting a prosecutor's fear that women in bad neighborhoods out late at night would be considered prostitutes or drug clientele and not “real” rape victims); Tjaden and Thoennes, *supra* note 2, at 22.

11. Frohmann, *supra* note 10, at 551.

for her past tendencies or incautious behavior, the less likely she is to be believed. If disbelieved, the victim will be less likely to come forward; even if she does, she will be less likely to convince the police, the prosecutor, or the jurors that her claim is true.

Although to modern ears the requirement of chastity seems obsolete, the tendency to blame victims for “asking for it” (by flirting, taking a man to her room, or drinking), or to believe that the victim was lying to cover an indiscretion or to gain revenge, still rings true. We do not mind if a rape victim has had some reasonable sexual experience, but if she is too promiscuous, she will fall into the category of “asking for it.” And if she has regained interest in sex or “partying” after the attack, such conduct undermines the veracity of her report, because “real” victims do not behave that way.¹² Finally, because women were historically silenced in the public sphere, their accusations were considered suspicious and subversive of the power hierarchy.¹³

It is not just the rape victim who elicits strong feelings. Historically, jurors were specifically warned about the catastrophic injustice that a false accusation could inflict on a man “tho never so innocent.”¹⁴ The alleged victim, a prominent evidence scholar suggested, should be subjected to a psychological exam.¹⁵ Although issues of prosecutor’s abuse of pretrial publicity and failure to make proper disclosures to the defense arise in many different contexts, such ethical lapses receive extensive attention and generate significant moral outcry in the context of rape.¹⁶ These ethical

12. For instance, the victim in the Bryant case was photographed by tabloid newspapers “dirty” dancing, and the headline read “Kobe’s Accuser Goes Wild.” This image was found on one of the many pages collecting photos and private information about the victim. Katelyn (Kate) Kristine Faber Images, <http://www.francesfarmersrevenge.com/stuff/images1/katefaber/6.htm> (last visited October 29, 2007).

13. As Professor Andrew Taslitz observed less crudely than I do here, as in the fairy tale *The Little Mermaid*, a woman could have a voice or a vagina, but not both. Taslitz, *supra* note 6, at 20. Taslitz analyzes the catch-22 that the victim faces—if she speaks up she will face skepticism, if she remains silent, then her later speech will not be credible either. *Id.* at 24. For an extreme example of the use of rape as a tool of suppression and reinforcement of hierarchy see Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 Mich. L. Rev. 675 (2002) (describing the Klan’s use of violent sex as a deliberate tool of social control).

14. This is a reference to Lord Matthew Hale’s famous and oft-repeated jury instruction regarding rape: “[I]t must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.” 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Philadelphia, Robert H. Small 1847).

15. See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 924(a) (3d ed. 1940) (recommending that all rape complainants undergo mandatory psychological examinations).

16. For instance, in the Duke rape case, see *infra* note 20–21 and accompanying text, the prosecutor was sanctioned and resigned for making improper pretrial statements about the defendants’ guilt and withholding exculpatory evidence. Duff Wilson, *Facing Sanction, Duke Prosecutor Says He’ll Resign*, N.Y. Times, June 16, 2007, at A1.

issues seem particularly acute in rape cases, where the stakes are higher and reputations can be ruined irrespective of the legal outcome.

It is interesting to speculate why ethical misconduct that beleaguers the system generally attracts attention and arouses particular indignation in rape cases. In rape cases, some people seem to rediscover the concept of presumption of innocence—one that lies dormant for them except, in theory, for other types of cases, such as those involving illegal drugs or robbery. Somehow, when a man is accused of a sexual crime, especially if the man is powerful and the woman seems to be subverting the patriarchal power structure, there are loud and long cries about the presumption of innocence and the prosecutor's high burden of proof. These cries may even attempt to proclaim the deep irony that the accused is the "true" victim.¹⁷ Perhaps this is because many financially secure and powerful men cannot imagine themselves falsely accused of a drug crime or a holdup, but can imagine a date gone horribly wrong, after which they are faced with a false accusation of rape.¹⁸ Furthermore, as sexual and social beings, we all relate to the complicated dynamics surrounding intimate relationships, and our veneer of impartiality and objectivity simply cracks. We all have a personal connection to issues of sex and intimacy, and may overidentify with the person we deem to be the aggrieved party (the accused or the alleged victim) in rape cases more so than in other types of crimes.

In discussing these cultural paradigms, I am necessarily painting with a broad brush. Not every case will fit these stereotypes or neatly align with rape myths. There are counterexamples that trigger other prejudices or concerns. For instance, one exception for this sympathy for the wrongfully accused male arises when racism trumps sexism, and the accused is a black man, particularly a poor one who is not an entertainer or a sports figure. This triggers a separate set of stereotypes about the black man as an out-of-control sexual animal, a racist stereotype Professor Andrew Taslitz has called the "Black beast."¹⁹ Here, at least, the white woman is more likely to be believed because there is a presumption that she would not agree to interracial sex. Therefore, the stereotype dictates that she must have been coerced by the accused, who is presumed to be unable to control his lust. Another variant was displayed by the Duke lacrosse rape case in which white college lacrosse players were charged with raping a black woman who arrived at their party to dance and strip. The bias against "frat boys" and the charged racial atmosphere in Durham, North Carolina, where the

17. See, e.g., Kobe Bryant Accuser Kate Faber Sex, Lies Drugs and Alcohol, <http://www.fratpack.com/article-main.php?id=36> (last visited Oct. 29, 2007) ("The more we dug into Kate Faber's past, the more we found that made us think Kobe Bryant was actually the victim in the case.").

18. I write this from the vantage point of a white woman, conscious of the privilege of whiteness and aware that people of color may not share my middle-class comfort that I will not be falsely accused of violent crimes or crimes against property, "tho never so innocent."

19. See Taslitz, *supra* note 6, at 28–31.

incident took place, led to a rush to judgment against the accused.²⁰ Subsequently, the prosecutor was disbarred for his public comments and for withholding crucial exculpatory evidence.²¹

Generally, however, cultural prejudices concerning the nature of rape, the rapist, and his rape victim are inescapable at trial. To convince the fact finder, both prosecution and defense must tell a compelling, plausible story that has narrative coherence and jibes with the juror's sense of reality.²² The advocates must not only flatter the triers of fact, but also must appeal to their good sense, and this sense of what is plausible is highly influenced by cultural attitudes about rape. Therefore, even prosecutors, who may not personally believe in rape myths, will screen for "convictability," anticipating how the defense will portray the victim and how the jurors will view her.²³ This process of "winnowing 'weak' cases out of the system"²⁴ enforces gender stereotypes and perpetuates the status quo.

Furthermore, victims themselves often engage in self-blame and their perception of what can fairly be deemed rape (as opposed to an unpleasant sexual encounter) will be informed by popular culture and the types of rape cases that have been pursued in court. In this respect, rape trials not only mirror social values, but also perpetuate them, setting the social (as opposed to necessarily legal) standard of what counts as rape.

II. RAPE TRIALS AND THE EVIDENCE ZEITGEIST

Two important phenomena have further complicated the issues around rape trials. First is the happy development of solid scientific evidence that has exonerated those falsely accused of rape.²⁵ In some cases the innocent

20. Duff Wilson & Jonathan D. Glater, *Prosecutor's Silence on Duke Rape Case Leaves Public with Plenty of Questions*, N.Y. Times, June 12, 2006, at A13. See generally Mosteller, *supra* note 3 (providing an extensive analysis of the Duke case).

21. Duff Wilson, *Prosecutor in Duke Case Is Suspended*, N.Y. Times, June 20, 2007, at A13.

22. See Taslitz, *supra* note 6, at 15 (discussing the jurors' need for narrative coherence and narrative fidelity). See generally Doron Menashe & Mutal E. Shamash, *The Narrative Fallacy*, 3 Int'l Comment. on Evidence 1 (2005).

23. See Frohmann, *supra* note 10, at 536, 544 (using ethnographic data to examine prosecutors' concern about the jury's perception of a victim's poor neighborhood as a shortcut to racial and sexist stereotypes about victims).

24. *Id.* at 553.

25. See, e.g., Meghan Gordon, *Charges in '84 Rape Case Dropped; No Retrial for Man Exonerated by DNA*, Times-Picayune (New Orleans, La.), Feb. 5, 2005, at 1; *Man's Release After DNA Exoneration Delayed More Than 2 Years*, nwi.com, Apr. 25, 2007, http://www.thetimesonline.com/articles/2007/04/25/updates/breaking_news/doc462f67b42cf58510003803.txt [hereinafter *Man's Release After DNA Exoneration*] (discussing the case of a man wrongfully imprisoned for thirteen years for a rape he did not commit who then spent an extra two years in jail because of an administrative error); Sharon Cohen & Deborah Hastings, *For 110 Inmates Freed by DNA Tests, True Freedom Remains Elusive* (May 28, 2002), <http://www.truthinjustice.org/truefreedom.htm> ("A team of AP reporters identified 110 cases through late May in which convictions were overturned because of DNA testing. Many other cases were pending. Most of the 110 men had been convicted of rape; 24 were found guilty of rape and murder, six of murder only. In criminal cases, the evidence most

man was incarcerated for years.²⁶ Because of recent advances in forensic science, DNA samples in particular, rape cases are chief among those in which falsely accused defendants have been exonerated.²⁷ One also wonders whether the emotional nature of rape, the public pressure to catch strangers who rape, and racist stereotyping about rapists influence police to use different tactics in rape cases, resulting in more false confessions and perjured testimony. There is no reason to believe that there is a higher incidence of false reports—if anything, rape is wildly underreported.²⁸

Even if rape cases are merely the canaries in the coal mines of justice that indicate the toxic condition of our criminal justice system,²⁹ the large number of exonerations receiving extensive coverage in the popular press has created an atmosphere where the notion of false accusation seems increasingly plausible. The acquittals resulting from DNA evidence have

often tested for genetic identification is bodily fluids, which explains the high number of rape convictions overturned.”).

26. *Man's Release After DNA Exoneration*, *supra* note 25. See generally Cohen & Hastings, *supra* note 25.

27. Rulings in rape cases are probably the type most often overturned because the physical evidence renders false accusations easier to detect than similar accusations in other cases, where such evidence may not have been present. *But cf.* Scott Turow, Op Ed., *Still Guilty After All These Years*, N.Y. Times, Apr. 8, 2007, at WK11 (discussing the case of Juan Luna who was identified by saliva on a chicken bone left at the scene years after a brutal murder in a fast-food restaurant).

28. As the Centers for Disease Control and Prevention explain,

Available data greatly underestimate the true magnitude of the problem. Rape is one of the most underreported crimes. Reporting rates for rape vary across studies. The National Violence Against Women Survey (NVAWS) found that only 1 in 5 adult women (19%) reported their rapes to police (Tjaden and Thoennes 2006). Estimates of rapes reported to the police from the National Crime Victimization Study (NCVS), conducted by the Department of Justice (DOJ), vary widely from year to year, from 39% in 2002 to 54% in 2003 (DOJ 2002, DOJ 2003).

Ctrs. for Disease Control and Prevention, Sexual Violence Fact Sheet, <http://www.cdc.gov/ncipc/factsheets/svfacts.htm> (last visited Oct. 29, 2007); see also Callie Marie Rennison, U.S. Dep't of Justice, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000, at 2 (2002), available at www.ojp.gov/bjs/pub/pdf/rsarp00.pdf (noting that 36% of rapes were reported to police during 1992–2000). *But see* Eugene J. Kanin, *False Rape Allegations*, 23 Archives Sexual Behav. 81 (1994) (reviewing police files and interviewing police concerning allegations deemed false and placing the number of false allegations at 41%, citing alibi, revenge, and attention seeking as the main reasons for false reports, although over half never named a specific perpetrator). Kanin's piece involved a small sampling of 109 people from a small midwestern urban community over a nine-year period. *Id.* The tone of the article is feminist in its rejection of rape myths and the unsupported belief that a vast majority of rape claims are false, nevertheless this one study is repeatedly cited as proof that women lie about rape. *Id.* Kanin himself has cautioned against overextrapolating from his study and others have criticized Kanin's willingness to believe that none of the recantations were under pressure. *Id.*; see also Phillip N.S. Rumney, *False Allegations of Rape*, 65 Cambridge L.J. 128, 139–40 (2006).

29. See generally D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761, 785 (2007) (extrapolating general wrongful conviction rate from the number of exonerated capital rape cases, and quoting Richard A. Rosen that DNA exonerations provide “a random audit” of convictions generally).

all been in stranger rape cases (if the accused admitted to sex and argued consent, the DNA would have little or no relevance). These exonerations involved stranger rape cases where misidentification by the victim logically should not have triggered concerns about vindictive or “crazy” girlfriends. Nevertheless, the frequency of reversal of rape convictions lends to a cultural atmosphere in which many women are seen to be mistaken or lying, and innocent men are suffering for it.

Second are the high-profile rape cases that the media has followed obsessively and relentlessly. I will examine the case of Kobe Bryant to illustrate some of the questions that arise at the intersection of evidence and ethics in a rape trial. In the Bryant case, a nineteen-year-old woman working at a resort accused the basketball star of rape. She admitted flirting with and kissing Bryant, but claimed that the intercourse that followed was nonconsensual. As discussed below, the victim received tremendous public attention, much of it negative. She ultimately decided not to cooperate with the prosecution and ended up settling her civil suit against Bryant shortly before his scheduled deposition in the civil case.

Understandably, in our celebrity-mad culture, cases involving famous entertainers or sports figures receive disproportionate media attention. These cases cannot be considered representative of the “average” rape trial.³⁰ The intense media attention, punctuated by professors and trial advocacy pundits, means that rules will be adhered to and lawyer strategies scrutinized. Also, these cases are atypical because the defense regularly out-investigates, outspends, and out-lawyers the prosecution. Nevertheless, the public perception and discussion of the trial process deeply impacts future cases and the cultural atmosphere surrounding rape accusations. This, in turn, shapes rape reporting and rape trials. If the female victim is portrayed as a greedy, lying slut, and is pilloried in the press and blogosphere, then other victims may think twice before reporting—even if they are not making charges against a rich or famous person.³¹ Such cases, even though they are not typical, foster many watercooler conversations. These notorious media-frenzied cases elucidate, and to some extent shape, cultural standards of “true” rape. They affect what the jury will expect in the way of evidence, both of the rape and impeachment of the complainant.³² These cases also influence the legal response to rape

30. See generally Laurie Nicole Robinson, Comment, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 Ind. L.J. 1313 (1998).

31. Victim reporting is not only important for the justice system and keeping streets safe. Research indicates that the victim benefits from reporting. See Du Mont et al., *supra* note 5, at 467 (citing research that reporting rape has been linked to restored well-being of victims and reduced chances of future victimization).

32. This is true in other areas of criminal law that involve forensic evidence. Some have claimed the existence of a CSI effect, whereby jurors develop unrealistic expectations of forensic evidence based on various investigative television shows. See Richard Willing, “CSI Effect” Has Juries Wanting More Evidence, USA Today, Aug. 5, 2004, at 1A. See generally Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 New Eng. L. Rev. 435 (2007).

throughout the process: from the victim's decision whether to report, the police's decision whether to pursue the claim, the prosecutor's decision whether to charge, the attorney's trial strategies, the judge's admission of evidence, and the jury's determination of guilt.

Attorneys who try rape cases must struggle with these cultural truths and then figure out what role societal notions of rape and images of victims should play in their formulation of the coherent and reliable narrative they hope to sell to the jury. In devising a strategy for framing the facts, to what extent may an advocate rely on rape myths? In her ethnographic study, Lisa Frohmann quotes a deputy district attorney who wrestles with this very question:

Would it be ethical to play along with biases and prejudices of [the] community? Can I say, Sorry Ms. Victim, I know you were raped, but I know the chances of winning are slim to none? That is like saying I am going to perpetuate the biases and never going to know change because I am never going to test them.³³

The intersection of evidence and ethics in rape trials raises questions not only of the limits of law but also questions concerning the rights of the accused and the balance between protection of the victim and paternalism towards her. To what extent do these special rules unfairly affect the accused who does not have a cloak of anonymity and whose sexual history will be on display for the jury? To what extent do the special rules of not naming the victim or protecting her sexual history telegraph helplessness and perhaps even the need for a rape victim to hide?

III. NAMING THE VICTIM

Rape cases often involve prohibitions against naming or giving out information about the victim. Often, these prohibitions mirror self-imposed limits by the media. Scholars, reporters, and ethicists debate the privacy interests versus the newsworthiness and First Amendment concerns raised by release of the victim's name.³⁴ Some states have legal prohibitions on disclosure.³⁵ In many cases, judges will issue an order forbidding disclosure of the name, address, and likeness of the victim.³⁶

33. Frohmann, *supra* note 10, at 536 (internal quotation marks omitted).

34. See Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 Fordham L. Rev. 1113, 1114–15 & nn.6–19 (1993) (discussing case and statutory law and citing various reporters' opinions regarding NBC's disclosure of the victim's name in the William Kennedy Smith rape trial).

35. See Daniel M. Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 Ala. L. Rev. 1177, 1188–90 & nn.114–29 (2007) (collecting and describing various state law, including Alaska, California, Connecticut, Florida, Massachusetts, New York, and Wyoming); cf. Simon Kearney, *Rape Payout Creates Privacy Law*, Australian, Apr. 4, 2007, <http://www.theaustralian.news.com.au/story/0,20867,21501550-7582,00.html> (reporting that a rape victim received a tort settlement from broadcaster that released her name).

36. As Professor Tom Lininger has observed, however, prosecutors' conviction objectives may not always be compatible with the victims' needs, and prosecutors may not

Various arguments can be made about the utility, wisdom, and fairness of withholding victims' names. Some have argued that the tendency to do so stigmatizes the victim, implying that her status is shameful.³⁷ The effort to avoid naming the victim singles her out for paternalistic treatment. Arguably, the nameless, faceless accuser seems diminished, if not erased. Others believe that it is unfair to the accused and subverts the presumption of innocence, and that, at the very least, the accused's name should be withheld as well.³⁸

Despite these legitimate concerns, the practical policy of encouraging women to report attacks and respect for the privacy of the victim demands a policy that withholds her name. In terms of getting victims to come forward, sixty-six percent of women polled said they were more likely to report a rape if their identities would not be revealed.³⁹ Because of the personal, sexual nature of the crime, and of the many ways in which rape victims are maligned in the media and the courtroom, it is understandable that victims wish to remain anonymous. Perhaps in an ideal world, public knowledge of her identity associated with personal facts of the rape would not cause the victim pain, but that is not the world we live in.⁴⁰

The niceties of this interesting ethical question have been thoroughly overshadowed by the realities of our modern culture and the ease of access to information. In the Bryant case, the media coverage and the blogosphere

"share victims' sense of urgency in protecting against disclosure of sensitive personal information." Tom Lininger, *Bearing the Cross*, 74 Fordham L. Rev. 1353, 1394 (2005).

37. See, e.g., Karen DeCrow, *Stop Treating Victims as Pariahs; Print Names*, USA Today, Apr. 4, 1990, at 8A. DeCrow, a former president of the National Organization for Women, discusses the Central Park jogger case and questions whether there it is "blatant sexism to assume that being raped (and left, bleeding, to die) is still such a disgrace for a woman that the victim's name must be concealed?" *Id.* The article ends, "Pull off the veil of shame. Print the name." *Id.* Students of rape myths, however, might observe that there is less shame when a victim is violently attacked, and more if she knew the accused and had been kissing him. See also Geneva Overholser, *Name the Accuser and the Accused*, Poynter Online, July 23, 2003, <http://www.poynter.org/column.asp?id=54&aid=42260> (questioning whether a decision to withhold the victim's name has prolonged the stigma, and fed the underreporting); Harry Reynolds, *Duke Rape Case Shows Why Censoring Names of Victims Is Bad Idea*, jg-tc online, Apr. 14, 2007, <http://www.jg-tc.com/articles/2007/04/14/opinion/columns/doc462021d1a06ad936949539.txt> ("In slamming the door on identity, the news media only reinforces the perception that the victim should feel guilty and hide in disgrace.").

38. Bettina Arndt, *In the Name of Justice*, Sydney Morning Herald, Dec. 2, 2003, at 15.

39. Denno, *supra* note 34, at 1130; see also Nat'l Victim Ctr. & Crime Victims Research and Treatment Ctr., *Rape in America: A Report to the Nation* (1992) [hereinafter *Rape in America*] (reporting the results of the National Women's Study); Joan Ryan, *Does a Name Empower or Stigmatize?*, S.F. Chron., Aug. 1, 2003, at A29 ("If the media began printing names of victims, the number would drop even more. Here is one sure bet: No woman would ever again come forward to hold a famous man accountable for raping her.").

40. See Ryan, *supra* note 39 (noting that victims feel judgment and revulsion from others); Robin Hindery, *Debate on Naming Rape Accusers Continues*, Feminist.com, Sept. 24, 2004, <http://feminist.com/news/vaw29.html> (noting the special challenges facing rape victims and quoting Helen Benedict that "[t]o name a rape victim is to guarantee that whenever somebody hears her name, that somebody will picture her in the act of being sexually tortured").

were so intrusive regarding the victim, that prohibiting the mention of her name in court, even if such a ban had been successful, would have been absurd.⁴¹

Whatever the utility of trying to keep a victim's name and identifying information confidential, the lawyers must abide by the court's orders not to disclose such information. An attorney's violation of rules against such disclosure raises important and difficult ethical and enforcement problems. In the Bryant case, the identity of the victim, Katelyn Faber,⁴² was disclosed by a radio talk show host,⁴³ tabloid media,⁴⁴ and inadvertently by the court.⁴⁵ Most notable, however, was the disclosure by Pamela Mackey, the attorney for Bryant, who named Faber six times in open court.⁴⁶

41. The victim's name, e-mail address, pictures, and other identifying information were easily ascertainable from the Internet. She received hate mail and credible death threats. See Sylvia Moreno, *A Different Spotlight for Bryant Accuser*, Wash. Post, Aug. 30, 2004, at A3.

As one commentator observed: "Not naming Kobe Bryant's accuser is becoming almost pointless. It's like handing her a tiny origami umbrella to shelter her from a shower of mud." Vicki Haddock, *Kobe Bryant's Nameless Accuser*, S.F. Chron., Aug. 22, 2004, at E1.

42. At this juncture the victim's name has been so widely disseminated that I am using it too.

43. Tom Leykis, whose show is based in Los Angeles and heard on sixty stations around the country, explained, "We're told that rape is violence, not sex, and if that's true there's no reason she should feel shame or embarrassment." See Family Violence Prevention Fund, Bryant Case Highlights Privacy Issues in Rape Cases, <http://www.endabuse.org/programs/display.php3?DocID=243> (last visited Nov. 11, 2007). On CNN Leykis stated,

The purpose of releasing the name of the alleged victim is to make sure that there is a fair trial in this case. By revealing the name of the accused and not the accuser, by protecting the identity of the accuser, you already put the idea in people's minds that there is a victim when this [sic] reality there may not be a victim.

Live from the Headlines: Interviews with Tom Leykis, Patricia Saunders (CNN television broadcast July 23, 2003) (transcript on file with CNN.com), <http://transcripts.cnn.com/TRANSCRIPTS/030723/se.04.html>.

44. The *Globe* was the first media outlet to disclose her identity. See Jeffrey Rodack, *Globe Defends Decision to Publish Photo, Name of Kobe Accuser*, Poynter Online, Nov. 5, 2003, http://www.poynter.org/dg.lts/id.53516/content.content_view.htm (arguing that details about the victim's identity, dress, sex life, and mental health were widely shared in the media and quoting another journalist that "[t]he identity of the 19-year-old woman who has charged Kobe Bryant with rape was the worst-kept secret in America even before the *Globe* put her name and her prom picture on its cover last week").

45. As the court explained,

On June 24, 2004, the court reporter mistakenly sent the transcripts of the *in camera* proceedings by electronic transmission to seven media entities . . . via an electronic mailing list for subscribers to public proceeding transcripts in the case, instead of using only the electronic mailing list for persons authorized to receive transcripts of *in camera* proceedings.

People v. Bryant, 94 P.3d 624, 626 (Colo. 2004). For a transcript of the unredacted court document, see Another Technical Foul-Up in Kobe Case, The Smoking Gun, <http://www.thesmokinggun.com/archive/0728042kobe1.html> (last visited Nov. 11, 2007).

46. Jeffrey Toobin, legal correspondent for CNN reported on the preliminary hearing and Kobe's attorney's "slip": "As for naming the victim six times, again, it was really shocking, and Pamela Mackey kept saying, gosh, I keep making this mistake. I really apologize. You know, once, twice, maybe three times is a legitimate mistake. Six times, you really start to think that it was an act of intimidation . . ." *American Morning: Bryant*

Mackey's so-called slip of the tongue heralded an aggressive defense strategy, and was viewed almost by all as a deliberate choice.⁴⁷ The judge seemed very irritated at Mackey—saying at one point that she needed a muzzle.⁴⁸ However, there were no negative consequences for her conduct, so that the apparent attempt to intimidate the witness went unchecked and was apparently successful. Though the “slip” was made in a preliminary hearing with no jury present, it was widely covered in the media. In fact the defense strategy seemed animated by the desire to create a negative image of the victim in the media and, where possible, in the courtroom itself.

Mackey's inserting information that the judge specifically barred from evidence in open court constitutes a kind of contempt of court and represents a kind of ethical violation that is almost impossible to police. Theoretically, the trial judge has many tools with which to influence attorney behavior. Courts can refer attorney misconduct to disciplinary authorities and the Rules of Professional Conduct and their enforcement by the courts and disciplinary authorities present a potential avenue for controlling attorneys' courtroom antics. Occasionally, courts revoke the admission of attorneys appearing pro hac vice based on their unethical behavior or for violating a court order.⁴⁹

In addition, the trial judge possesses inherent contempt powers and general authority to direct the activity of the courtroom and manage the presentation of evidence. Interestingly, there is very little case law applying any of these sanctions to rape trials. In *Vizzi v. State*, the Florida Court of Appeals affirmed a defense attorney's five-day jail sentence for criminal contempt.⁵⁰ The attorney, despite repeated court warnings, insisted on mentioning the prior sexual behavior of the victim. This opinion is notable for its rarity. And it is interesting to observe that the defendant was acquitted in this case, although his attorney spent five days in jail, for,

in Court (CNN television broadcast Oct. 10, 2003) (transcript on file with CNN.com), <http://transcripts.cnn.com/TRANSCRIPTS/031010/ltm.01.html>. In support of the notion that Mackey did not just “forget,” she actually, according to one court observer, filed a motion requesting that Kate Faber be named or else referred to as the complainant, rather than the victim. *Bryant Defense Asks that Accuser Not Be Referred to as ‘Victim’ in Court*, Court TV News, May 5, 2004, http://www.courtvtv.com/trials/bryant/050504_victim_ap.html. Clearly the issue of how to refer to Faber was on Mackey's mind.

47. Attorney Mackey apologized to the court and stated that she would write a note reminding herself not to use the victim's name. See *Bryant's Lawyer Lives Up to Reputation*, CNN.com, Oct. 12, 2003, <http://www.cnn.com/2003/LAW/10/12/bryant.case.ap/index.html>. Mackey's direct naming of the alleged victim was widely perceived as intentional and as an ethical lapse. See, e.g., Mark Shaw, *All Parties Share Blame for a Travesty of Justice*, USA Today.com, Sept. 2, 2004, http://www.usatoday.com/sports/basketball/nba/2004-09-02-shaw-analysis_x.htm (“From the moment that Bryant defense lawyer Pamela Mackey violated every semblance of judicial decorum by announcing six times the alleged victim's name during an initial court hearing, the game was on.”).

48. See *American Morning*, *supra* note 46.

49. See, e.g., *State v. Grossberg*, 705 A.2d 608 (Del. Super. Ct. 1997) (revoking an attorney admission for violating an order limiting pretrial publicity). Mackey, a local Colorado attorney, was not arguing pro hac vice and hence revocation of that privilege did not apply to her.

50. *Vizzi v. State*, 501 So. 2d 613, 621 (Fla. Dist. Ct. App. 1986).

among other things, calling the victim “trash, gutter filth . . . a whore, a two-bit whore.”⁵¹

Federal Rule of Evidence 611 and the analogous state rules give courts wide latitude to provide “reasonable control over the mode and order of interrogating witnesses,” with an important purpose to “protect witnesses from harassment or undue embarrassment.” But there is almost no case law construing these broad principles. Judges regularly may admonish counsel to desist from compound, confusing, harassing, or unduly embarrassing questions, but such judgment calls are within the broad discretion of the court and rarely are raised on appeal. The Rule itself talks about *undue* embarrassment⁵² because some level of embarrassment is to be expected, especially when witnesses are impeached.⁵³ The discomfiture of a witness generally cannot trump the accused’s right of confrontation.

However, by failing to heed the court’s order not to name the victim, Mackey arguably violated both a court order and Colorado’s Rules of Professional Conduct. These transgressions could have subjected her to criminal contempt or a referral to the disciplinary authority, but, to my knowledge, she suffered no consequence. Colorado Rule of Professional Conduct 3.4 provides in relevant part that “[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists” and prohibits an attorney from alluding at trial “to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”⁵⁴ More generally, Colorado Rule 8.4 provides that it is professional misconduct for a lawyer to engage in conduct that is “prejudicial to the administration of justice,” “violates accepted standards of legal ethics,” or “adversely reflects on the lawyer’s fitness to practice law.”⁵⁵ If one could prove that Mackey knowingly uttered the victim’s name (the circumstances, her cavalier attitude, and the fact that she did it six times in one hearing could provide objective evidence of motive), then arguably Mackey violated Rules 3.4 and 8.4. She ignored a court order and purposely raised irrelevant, prejudicial matters. In doing so, she prejudiced the administration of justice and diminished respect for law. It is questionable whether these ethical rules could provide a sufficiently strong deterrent to an attorney who is willing to take the heat for publicly flouting a judge’s order not to name a rape victim.

51. *Id.* at 615.

52. The word “undue” originally modified harassment and embarrassment, but was moved to modify only embarrassment in an early amendment to the proposed rule. 28 Wright & Gold, *Federal Practice and Procedure: Evidence* § 6161, at 323 (1993).

53. *Id.* § 6164.

54. Colo. Rules of Prof’l Conduct R. 3.4(c), (e). Colorado has adopted a version of the Model Rules of Professional Conduct as its ethical code. The Model Rules have been adopted by all states aside from California, Maine, and New York.

55. *Id.* R. 8.4(d), (g), (h).

IV. RAPE SHIELD

In response to the poor treatment of rape victims and concerns that such victims were being scared off from testifying, a nationwide movement arose in the 1970s and 1980s to amend rape laws. These changes included evidence reform in the form of rape shield laws.⁵⁶ Although the statutes vary considerably, rape shield is designed to restrict information about the victim's sexual history, behavior, and preferences in order to limit irrelevant inquiries that may embarrass or harass the victim.⁵⁷ Rule 412, the federal rape shield statute, excludes evidence of the victim's prior sexual behavior or sexual predisposition,⁵⁸ limiting intrusive questions about the victim's sexual history and character for chastity,⁵⁹ including what the victim was wearing at the time of the alleged assault.⁶⁰

Rape shield is not absolute, and allows some prior evidence of the victim's sexual conduct. The federal rape shield rule recognizes three exceptions: (1) allowing evidence that a person other than the accused was the source of semen or injury, (2) allowing evidence of the victim's prior sexual relationship with the accused to prove consent, and (3) an ill-defined safety-net exclusion that provides for admitting evidence about the victim's sexual history and propensities where failure to admit such evidence "would violate the constitutional rights of the defendant."⁶¹

56. The rape law reform movement also included changes to substantive rape law such as redefining rape to include the wife of the accused, eliminating the need for corroboration, and no longer requiring that the victim physically resisted her attacker. *See* Horney & Spohn, *supra* note 5, at 118–19.

57. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *Geo. Wash. L. Rev.* 51, 81–86 (2002) (dividing rape shield statutes into four categories, distinguished by the manner and degree to which they admit evidence of a woman's sexual history).

58. Fed. R. Evid. 412. Without the protection of rape shield, such character evidence about the victim could be admissible under Rule 404(a)(2), which permits the accused to raise pertinent character traits about the victim. In this short essay, I will only discuss the criminal part of rape shield. Rule 412 also provides for protection of a party's sexual history in civil cases—often harassment or civil suits for sexual battery.

59. Historically, a victim's sexual history was deemed relevant because it shed light on her propensity to consent and because loose women were inherently unreliable and should be impeached as such. *See* Anderson, *supra* note 57, at 60–81 (discussing the historical requirement of chastity both as a measure of harm and as an indication of the woman's character).

60. The Advisory Committee also interpreted the prohibition on the victim's "sexual behavior" to include the alleged victim's lifestyle, mode of speech, and dress. Fed. R. Evid. 412 advisory committee's note.

61. Fed. R. Evid. 412(b)(1). All three exceptions are controversial. The first two represent compromises between the unfair prejudice of the victim's sexual history and the accused's needs to tell a coherent story and place his version of events in context. Scholars document an "intimacy discount" by which crimes against intimates are less likely to be perceived as criminal activities or will be punished more leniently. *See* Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 *Emory L.J.* 691, 701–06 (2006). Yet rape shield statutes make an exception for evidence of previous sexual activities between the accused and the victim, so that the accused can tell a full story and contextualize his perception of consent.

Rape shield is designed to deprive the jury of precisely the type of information that promotes rape myths.⁶² By withholding information about the victim's sexual history and proclivities, rape shield counteracts the unfair prejudice arising from the jury's adopting sexist conclusions based on the woman's activities, dress, or sexual history. By limiting access to this technically irrelevant, but practically explosive evidence, rape shield curbs the jury's reliance on the rape myth that the victim "asked" to be raped or that because of her incautious or provocative behavior, she does not deserve society's protections.⁶³ Rape shield was also intended to promote rape prosecutions by making the trial itself less of an ordeal for the victim.⁶⁴ By sparing women humiliation and trauma, rape shield encourages reporting and allows the government to prosecute rape cases.⁶⁵

In some respects, this is real progress, and blatant attempts to invade the privacy of the victim, shame her, or otherwise discourage her from testifying have been limited by rape shield. Nevertheless, the reforms in rape law have not been as effective as proponents had hoped.⁶⁶ This is both because of the exceptions to the rape shield law and because much of the harassment of the victim takes place outside the reach of the courts or the law in general.

The Bryant case serves as an example of a case in which rape shield has not managed to shield the complaining witness properly. In fact, this case has proved the strategic value of vilifying and demeaning the victim, and

62. It is also interesting to think about prosecutors' use of rape myths, though it is beyond the scope of this essay. Just as there are sexist myths about female victims, there are sexist and racist myths about perpetrators. Is it better for society if a prosecutor secures a conviction by relying on the virginal character of the victim? Is justice served if the prosecutor plays upon the fact that the accused is a black man who was unknown to the victim, or a "loser" with no girlfriend—thereby reinforcing those rape myths? Although this "framing" of the alleged perpetrator's personality and history may secure a conviction, the harm to our system of justice and the perpetuation of rape myths is still problematic. See Orenstein, *supra* note 7, at 700–01; Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. Cal. Rev. L. & Women's Stud. 387, 493–94 (1996).

63. See Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. Sch. L. Rev. 123, 154–55 (1992).

64. See Glen Weissenberger & James J. Duane, Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority § 412.1, at 173 (2001) (noting that admission of victim's sexual history leads to "a detriment of the prosecution of alleged rapists by victims who wished to avoid public exposure of their past sexual behavior").

65. Representative Elizabeth Holtzman remarked in support of Rule 412,

Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. 124 Cong. Rec. 34,913 (daily ed. Oct. 10, 1978) (statement of Rep. Holtzman).

66. See Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 Cal. L. Rev. 827, 830–31 (1999) (noting that "rape reforms have had far less impact than hoped"). Scholars have questioned whether changes in the laws concerning rape trials, particularly rape shield that offers judges wide discretion, actually have a positive effect on victims' willingness to come forward, the decision to prosecute, or the outcomes of trials. See Horney & Spohn, *supra* note 5, at 140–42.

thus seems more likely to discourage than promote women's willingness to report rape and participate in the judicial process.⁶⁷ Part of the problem lies in the fact that much of the ill treatment of the victim occurred in the media outside the jurisdiction of the court,⁶⁸ though even in the halls of justice, the victim was not shielded from rough treatment.

In the Bryant case, the defense first argued that the Colorado rape shield statute violated the federal and Colorado constitutions by depriving the accused of equal protection and due process.⁶⁹ One of the reasons Bryant's attorneys objected to the Colorado rape shield statutes was their perception of the imbalance that arises when the alleged victim's sexual history is protected but the sexual history of the accused is affirmatively deemed admissible.⁷⁰ When it lost that argument, the defense turned to the exceptions in the Colorado rape shield statute.⁷¹ That statute makes an

67. See, e.g., Kim Nguyen & Wayne Harrison, *Kobe Bryant's Criminal Case Dismissed*, KMGH Denver, Sept. 2, 2004, <http://www.thedenverchannel.com/news/3699625/detail.html> ("This case has been an unmitigated disaster for true rape victims. It will increase distrust. It will cause underreporting to increase . . ." (internal quotation marks omitted)); Amanda Paulson, *Is the Rape-Shield Law Working?*, Christian Science Monitor, Mar. 25, 2004, at 12 (Bryant case "could also make future victims fearful that their past will be investigated as ruthlessly as this woman's has been").

68. See generally Richard I. Haddad, *Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases*, 39 Colum. J.L. & Soc. Probs. 185 (2005) (arguing that the primary problems for the victim in the Bryant case were the disorganization of the judge, the bumbling of the prosecutor, and the outrageous behavior of the media and Bryant's fans, rather than any technical problem with the rape shield statute).

69. Order re: Defense Motion to Strike Rape Shield Statute as Factually Unconstitutional, *People v. Bryant*, No. 03 CR 204 (D. Colo. June 10, 2004), available at <http://f11.findlaw.com/news.findlaw.com/cnn/docs/bryant/cobryant61004ord.pdf>.

70. *Id.* at 3. Colorado has patterned this sexual propensity rule after Federal Rule of Evidence 413. Colo. Rev. Stat. § 16-10-301 (2007). Federal Rule of Evidence 413 allows evidence of the accused's prior sexual misconduct to be "considered for its bearing on any matter to which it is relevant," so that in a rape trial, the prosecution can introduce evidence of past sexual offenses to show that the accused has the character and predatory tendencies of a sexual offender. Jurors are invited to use the prior sexual misconduct evidence to infer that because the accused committed rape on a previous occasion, he was more likely to have committed the rape charged. The prior rapes need not have resulted in convictions, or even arrests. The standard for proving the prior offense is whether a jury could believe by a preponderance of the evidence that the offense occurred. See, e.g., *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) ("The district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the 'other act' occurred."); *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000) (noting that Rule 413 requires "the judge to conclude that the jury could find by preponderance of the evidence that the offenses occurred"). See generally Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule 403*, 90 Cornell L. Rev. 1487 (2005).

71. The Colorado rape shield statute creates a presumption that evidence of the victim's sexual conduct and reputation is irrelevant; it does not actually exclude evidence, so much as guide the judge's discretion in determining relevance. Colo. Rev. Stat. § 18-3-407; see also Anderson, *supra* note 4, at 17-18. Anderson traces all the arguments that Bryant's attorneys made regarding exceptions to rape shield, including (1) demonstrating her pattern of sexual conduct with third parties to show the accuser's knowledge, intent, common plan, pattern, and modus operandi; (2) the victim's false statements to police about her sexual activity before and after the incident to show her lack of credibility; (3) *res gestae* evidence of her other sexual encounters to put the event into context and to understand that the victim's regular sexual conduct was outside the norm; and (4) evidence of an alternative source of

exception for “[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.”⁷²

In the preliminary hearing, defense attorney Mackey cross-examined a detective who had testified that he had talked to a nurse at the hospital. This nurse noted that the victim had bruising on her jaw and laceration on her vagina consistent with penetrating genital trauma and inconsistent with consensual sex.⁷³ Mackey asked the detective whether he had inquired of the nurse if the victim’s injuries were “consistent with a person who had had sex with three different men in three days.”⁷⁴ The question drew an immediate objection from the prosecution, a call for a recess from the judge, and stirred up a huge media response in print, on television, and in the blogosphere.

Arguably, this aspect of the victim’s sexual history fell within an exception to the Colorado Rape Shield Rule, similar to an exception in Federal Rule of Evidence 412, regarding evidence relating to an alternative explanation for the source of injury. If the prosecution argued that the victim’s injuries were attributable to rape by Bryant, surely the defense could offer proof that she received those injuries from sex with another man.⁷⁵

Therefore, at some point, evidence of alternative sources of injury might have properly been admitted. However, the timing and manner in which this information was presented raise serious questions of fairness. Evidence that the victim had engaged in sexual intercourse within seventy-two hours before the alleged rape is quite different from Mackey’s posit of three separate men in three days. Even assuming that Mackey had a good faith belief that the victim had had sex with three men during this time period, the phrasing of the question—“three men in three days”—indicated both flippancy and an attempt to highlight the casualness of the victim’s encounters, making the victim seem carelessly promiscuous. By asking the question in the way she did, defense attorney Mackey circumvented all the potential protections and immediately drew on the rape myth of the

semen or injury. As Anderson notes, it is only this last argument that passes the laugh test, and is the one that best supports the defense’s theory.

72. Colo. Rev. Stat. § 18-3-407(1)(b).

73. Transcript of Record at 112, *People v. Bryant*, No. 03 CR 204 (D. Colo. Oct. 15, 2003), available at <http://www.thesmokinggun.com/archive/kobetranf9.html> (last visited Oct. 29, 2007). The injury to the jaw was consistent with the victim’s description of how Bryant held her down.

74. *Id.* at 113.

75. Indeed, the underwear that the victim wore to the hospital contained semen and pubic hair from another man, so the defense had a good faith belief that some other sexual activity had taken place around the time of the alleged rape. Among the three men averred to in the question, the defense included the accused rapist as one and claimed to have a good faith belief as to the existence of a third man.

promiscuous victim getting what she deserved and perhaps secretly desired.⁷⁶

Colorado rape shield provides many procedural protections—none of which were followed in this instance. The state's law, like most other rape shield statutes, contains many procedural protections for the alleged victim. The defense must jump through many hoops so that, even when sensitive questions may be broached concerning the complainant's prior sexual history, they must be posed without surprise and with proper protection of the alleged victim's privacy. For instance the rape shield statute has provisions for including a written motion, an affidavit, an offer of proof, a filing under seal, an in camera hearing, and the potential for a protective order.⁷⁷ Victims may be particularly influenced by how their personal and potentially embarrassing sexual histories and proclivities are disclosed.⁷⁸

In the Bryant case, the tone and content of defense attorney Mackey's question shook the victim, and was part of the reason that she eventually refused to cooperate with the prosecution.⁷⁹ Mackey signaled that the victim's personal life would be on display and subject to ridicule and scorn. Rape shield operated as the thinnest cloak of protection for the victim, and essentially left her out in the cold. The Bryant case illustrates how legitimate interpretations of the rape shield exceptions may encourage defense attorneys to circumvent the spirit of the rule's protection.

76. As ESPN news, not usually noted for its incisive legal analysis, suggested, "[T]he case would have ultimately rested on the testimony of a young woman the defense suggested was a promiscuous, attention-seeking liar." *Case Will Not Be Retried, but Civil Trial Pending*, ESPN News, Sept. 2, 2004, <http://sports.espn.go.com/nba/news/story?id=1872740>.

77. See Colo. Rev. Stat. §§ 18-3-407 (2)(a) (requiring a motion), (2)(b) (affidavit), (2)(c) (offer of proof), (2)(d) (in camera hearing), (2)(e) (specific judicial finding), (2)(f) (seal), (3)(a) (protective order). There is evidence, however, that courts will not apply such notice limitations strictly if they deprive the accused of an important confrontation right. See *Lajoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000) (reversing a district court's exclusion of evidence for failure to give notice under the rape shield statute); cf. *People v. Cobb*, 962 P.2d 944, 946 (Colo. 1998) (holding that exclusion of a witness who did not appear on defense's witness list is too harsh a penalty given Confrontation Clause concerns).

78. Horney and Spohn discuss how the procedural requirement of an in camera hearing to determine admissibility under rape shield exceptions is observed in the breach, especially when the exception related to the prior relationship of the victim and the accused is triggered. See Horney & Spohn, *supra* note 5, at 141–43.

79. There are many reasons that the victim might have stopped cooperating, including a belief that the prosecution was bumbling. See Anthony J. Sebok, *Why Did Kobe Bryant's Accuser Stop Cooperating with Prosecutors?*, FindLaw, Sept. 6, 2004, <http://writ.news.findlaw.com/sebok/20040906.html>. Other reasons might be the fact that Bryant apologized for her pain and recognized that she felt violated, as well as the harassment the victim felt from media and individual Kobe fans, including death threats. See *People v. Bryant*, 94 P.3d 624, 636 n.12 (Colo. 2004) (noting that "the victim's physical safety has apparently been jeopardized by the publicity in this case"). John Clune, one of the victim's attorneys, stated, "The difficulties that this case has imposed on this woman the past year are unimaginable." *Rape Case Against Bryant Dismissed*, MSNBC News, Sept. 2, 2004, <http://www.msnbc.msn.com/id/5861379/>. Clune indicated that the victim was particularly disturbed by mistakes including the release of her name on a state court's web site and her medical history to attorneys. *Id.*

The issue of rape shield is a subset of a larger issue concerning the cross-examination of victims. The treatment of witnesses generally is an important question of ethics and civility in the courtroom. Though crucial to the proceedings, rape victims are not themselves parties and have almost no control over the course of proceedings.⁸⁰ Given recent developments in Confrontation Clause jurisprudence,⁸¹ the importance of live testimony by complaining witnesses and the ability to cross-examine them has been heightened.⁸²

Doubtless, it is galling for any honest witness, let alone a victim of a crime, to be cross-examined in such a way that makes him or her look like a liar. There is something especially degrading about the cross-examination of an honest rape victim. She is made to relive a traumatic moment in her life and discuss sexual matters in open court. Furthermore, in consent cases, the defense rarely asserts that the victim is mistaken—that works for stranger cases, but not so well for acquaintance rape. Rather, the victim is portrayed by the defense as delusional (either mentally unsound or so terribly repressed she cannot confront her own complicity in having had sex), a vengeful liar, a gold digger, an attention seeker, or an unpaid prostitute.

Yet we cannot very well insist that defense attorneys take it easy on rape victims—that would subvert the attorney's duty to zealously represent their clients. In its Criminal Justice Standards, the ABA provides that "[d]efense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."⁸³ In her role of making the government prove its case, a defense attorney may, and indeed must, attack the sufficiency and reliability of the government's case, even if she is personally convinced of her client's guilt. Therefore, although cheap shots against the victim are unfair, unkind, and arguably bad for society, such behavior is to be expected of defense attorneys for whom the freedom and reputation of their clients is at stake.⁸⁴ In fact, it was precisely this

80. In fact, one commentator has advocated providing victims with attorneys who would have standing to object to any party's questioning for victims of sexual assault and domestic violence. See Lininger, *supra* note 36, at 1398–1400.

81. See *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that, for a testimonial statement to be admissible, the declarant/witness must be made available for cross-examination, and defining the key term "testimonial" to include formal statements in legal proceedings and to the police, as well as any statement that the speaker could reasonably expect to be used in a future legal proceeding against the person implicated); see also *Davis v. Washington*, 126 S. Ct. 2266 (2006) (holding that statements made to police officers in a domestic violence case after the emergency has subsided are testimonial, but that statements made during a 911 call for help and at the scene while an emergency still existed are nontestimonial).

82. See Lininger, *supra* note 36, at 1363–66 (discussing the effects of recent Supreme Court confrontation jurisprudence).

83. Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-7.6(b) (3d ed. 1993).

84. See Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 Dick. L. Rev. 563, 577–80 (1996) (examining the trend towards increased adversarialism and away from truth-seeking missions). Lawry

tendency to cast the alleged victim in a bad light that rape shield was created to counteract.

This defense's duty to represent an accused zealously and impeach even honest witnesses arises in part from the presumption of innocence and from the criminal defense lawyer's duty to ensure that the prosecution has met its burden of proof.⁸⁵ Relatedly, the criminal defense lawyer often knows that a particular government witness is honest only because of confidential information transmitted by the accused.⁸⁶ It would place an unfair burden and odd disincentive to attorney-client candor if disclosures made to defense attorneys rendered them less zealous or effective in the courtroom.

V. CIVIL SETTLEMENTS OF RAPE CLAIMS

Rape is a tort as well as a crime, and the relationship between the two actions raises some interesting ethical and evidentiary questions. A disagreement exists as to whether threatening to use criminal sanctions as a way of gaining a civil settlement is unethical. Such conduct had been prohibited by the Code of Professional Responsibility,⁸⁷ but no such prohibition exists in the more modern Rules of Professional Conduct, and ABA Opinion 92-363 advises that a lawyer may raise the possibility of criminal charge in negotiating a civil claim, as long as the two claims are related and the lawyer does not claim to have an improper influence over the criminal case.⁸⁸

A threat of criminal prosecution raises issues of extortion and fairness in any type of case, but as with other aspects of rape law, these concerns are magnified in rape cases because the stakes for the accused are so high and because it taps into stereotypes about complainants. The prospect of a lying, conniving accuser—a so-called victim—who plans to use the threat of criminal sanction and publicity to extort a civil settlement from an innocent accused plays right into rape myths. It resonates particularly well when the accused is rich and famous. In such cases the victim appears to have chosen someone wealthy whose reputation will be of interest to the public. Furthermore, unless the victim is powerful, the victim is also

observes, "Appeals to honor and conscience are gone. In place of the lawyer's discretion and judgment is an admonition to degrade, demean, invade, and insult if there is any tactical advantage to be gained by the client." *Id.*

85. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 Notre Dame L. Rev. 635, 667–70 (2006).

86. *Id.*

87. Model Code of Prof'l Responsibility DR 7-105(A) (1983) ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."). Some jurisdictions, such as California, the District of Columbia, and Florida have retained this prohibition despite their adoption of the Model Rules. See Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 447–48 (7th ed. 2005).

88. See Gillers, *supra* note 87, at 447.

subverting the power structure by challenging the actions of a powerful aggressor.

Professor Antony E. Simpson traces the image of the complainant as “malicious, venal, or disturbed” to eighteenth-century England, where defense attorneys used the strategy of portraying the complainant as a femme fatale out to extort money or a marriage proposal.⁸⁹ Despite its biblical roots,⁹⁰ the idea that marriage is a remedy for rape has lost its caché in modern society. Not so, however, for the image of the gold digger⁹¹—a conniving female who underhandedly tricks men into sex for purposes of extortion or paternity payments.⁹²

In Bryant’s case, the victim sued civilly three weeks before the prosecutor dropped the criminal charges against him.⁹³ Both when the criminal case was dropped and when Bryant settled with the victim, there was an outcry against the victim.⁹⁴ For instance, one blogger, whose web page lists the victim’s full address and other contact information, stated,

Well, the TRUE COLORS of Kate Faber have come out! She has decided not to cooperate with prosecutors in the criminal case against Kobe . . . why? So she can pursue her civil (money) claim against him full speed. Wow, what a fucking shocker! As a result of her decision, the district attorney has decided to drop all charges and the judge has dismissed the criminal case altogether! I really hope Kobe countersues this gold digging whore.⁹⁵

89. Antony E. Simpson, *The “Blackmail Myth” and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation of a Legal Tradition*, 77 J. Crim. L. & Criminology 101, 109 (1986).

90. *Deuteronomy* 22:28–29 (“If a man meets a virgin who is not engaged, and seizes her and lies with her, and they are caught in the act, the man who lay with her shall give fifty shekels of silver to the young woman’s father, and she shall become his wife. Because he violated her he shall not be permitted to divorce her as long as he lives.”).

91. Cf. Golddigger Lyrics, 365.com, <http://www.sing365.com/music/lyric.nsf/Golddigger-lyrics-Kanye-West/455A56FFA5F48AFA482570560053ED5E> (last visited Nov. 11, 2007) (quoting a rap song that includes the lyrics, “18 years, 18 years; She got one of yo’ kids, got you for 18 years; I know somebody payin’ child support for one of his kids; His baby momma’s car crib is bigger than his”).

92. Bryant’s accuser was criticized for accepting \$20,000 from Colorado Victims’ Compensation Fund.

93. See Patrick O’Driscoll, *Kobe Bryant, Accuser Settle Her Civil Lawsuit*, USA Today.com, Mar. 2, 2005, http://www.usatoday.com/sports/basketball/nba/2005-03-02-bryant-settles_x.htm.

94. Colorado has caps on noneconomic damages, and “a jury in a civil trial can award up to \$366,250 in noneconomic damages for emotional distress and up to double that (\$732,500) if the plaintiff can prove by clear and convincing evidence that her mental pain and suffering exceeded the initial cap.” Marcia C. Smith, Wood Angeles for Best Result (Sept. 3, 2004), <http://www.perrybinder.com/kobeocregister.htm> (internal quotation marks omitted). It is unclear, however, what the value of avoiding trial was to Bryant. Avoiding depositions that could have involved embarrassing questions concerning Bryant’s relationship with other women might have induced Bryant to settle for more than the maximum Faber could have recovered.

95. Kobe & Kate (Sept. 1, 2004), <http://www.rajuabju.com/kobeyskate.htm>. In a previous post the same blogger observed, “If Kobe raped her, what would be a better and more fitting punishment . . . jail time, or paying out money? Hmmm. I think that most

Although a defense attorney cross-examining a rape victim alleging that she has made her complaint just to get money from the accused is tapping into rape myths, such a question is not covered by rape shield. It falls squarely within impeachment for bias under the current rules of evidence.⁹⁶ For instance, in a more recent rape trial against a polygamist sect leader, the defense informed the jury that the victim “first went to a civil lawyer before going to the police.”⁹⁷

Professor Tom Lininger has suggested amending the rules of evidence to include a provision barring impeachment of the victim on the grounds that she is suing the accused in tort.⁹⁸ He notes that such evidence, while having little relevance to the guilt of the accused, is highly prejudicial. Lininger relates the prejudice to jurors’ revulsion that a victim stands to gain financially.⁹⁹ I would add that the unfair prejudice arises even more strongly from rape myths. The jurors may ascribe or be susceptible to the rape myth that women who cry rape have something personal to gain from the accused’s downfall, such as revenge, exoneration for their own indiscretions, or cold cash.

Furthermore, Lininger rightfully notes that tort suits based on sexual assault are appropriate personal and societal responses to such an attack.¹⁰⁰ As Professor Anthony Sebok observes, the civil case is the one venue where the victim can assert some control over the proceedings.¹⁰¹ The impeachment of victims for exercising their rights to a civil remedy may unfairly discourage such suits. Many states have short statutes of limitations so the victim cannot wait to file (besides, the victim will be asked about any plans to sue civilly during the criminal case).¹⁰² The victim should not have to choose between justice and compensation.

people would prefer to see him do some hard time behind bars. Why would Kate rather get paid? Is money what this whole thing is about? I’m shocked!” *Id.* This example is typical and not more profane or hostile than many other posts. For example, a post on the *LA Times* Lakers fan blog page concerning whether Kobe would stay with the team: “Kobe, please don’t leave us fans in the dark. We are suffering here, please understand that. We have supported you through thick and thin. We’ve supported you when KATE FARBER [sic], the whorish opportunist in Denver, falsely used an allegation of the most heinous crime, rape, to extort money from you.” Posting of Troy (TaosHum) to Lakers Blog, http://lakersblog.latimes.com/lakersblog/2007/06/so_if_he_goes.html (June 16, 2007, 20:16 EST).

96. Although there is no specific rule concerning impeachment for bias, the Supreme Court has recognized that it survived the codification of the Federal Rules of Evidence upon which the Colorado rules are fashioned. *See United States v. Abel*, 469 U.S. 45 (1984) (holding that impeachment for bias is relevant, historical, intended by the rule drafters, and essential to the accused’s right to confront witnesses).

97. John Dougherty, ‘Jane Doe’ Testifies as Trial of Polygamist Leader Begins, N.Y. Times, Sept. 14, 2007, at A17.

98. *See* Lininger, *supra* note 36, at 1400–02.

99. *Id.* at 1401.

100. *Id.* at 1402.

101. Anthony Sebok, *The Kobe Bryant Accuser’s Civil Suit: Why It Isn’t Redundant with the Trial or the Victims’ Fund, and Why One of Its Claims Is Very Unusual*, FindLaw, Aug. 23, 2004, <http://writ.news.findlaw.com/sebok/20040823.html>.

102. *Id.*

Finally, the relationship between the civil and criminal suits is complicated by the potential of witness tampering.¹⁰³ Most states, including Colorado, arguably do not allow victims to drop the criminal charges in exchange for a cash settlement of the related civil charges.¹⁰⁴ In his apology to the victim, which immediately followed the decision by the prosecutor to drop all charges with prejudice, Bryant stated, "I also want to make it clear that I do not question the motives of this young woman. No money has been paid to this woman."¹⁰⁵ There is at least some opinion, however, that a victim can withhold cooperation with the prosecution in exchange for a civil settlement.¹⁰⁶

Finally, some expressed concern that the victim ignored a public duty to help punish lawbreakers by making a private settlement.¹⁰⁷ Again, at least part of the harshness of this criticism can be traced to negative stereotypes about venal rape victims.

CONCLUSION

Although rape trials present unique and exaggerated challenges, they nevertheless provide a thought-provoking forum for examining the functioning of the American jury trial and for considering the relationship among law, ethics, and culture. I have focused on issues involving the identification and questioning of the rape victim. These issues trigger stereotypes about victims, involve problems arising from the adversary system, and highlight our duty to allow those accused of crimes to confront the witnesses against them. Both the Rules of Evidence and the Rules of Professional Conduct are particularly unhelpful in assisting attorneys to confront these problems.

103. See generally William H.J. Hubbard, *Civil Settlement During Rape Prosecutions*, 66 U. Chi. L. Rev. 1231 (1999) (arguing that structurally, the tampering statutes seems to fit rape cases where the victim agrees not to testify in the criminal case in exchange for a civil settlement, but that those statutes are rarely so applied).

104. The Colorado statutes for bribing a witness, Colo. Rev. Stat. § 18-8-603 (2007), and witness tampering, *id.* § 18-8-707, do not seem to fit the template of settlement in exchange for refusal to cooperate, given that the victim was not subpoenaed and the prosecutor did not try to force her to participate in the criminal case.

105. Nguyen & Harrison, *supra* note 67.

106. See State Bar of Mich., Standing Comm. on Prof'l and Judicial Ethics, Op. RI-78 (1991) ("A lawyer may properly advise a client to either withhold or pursue criminal proceedings when such action is consonant with the protection of the client's rights and . . . may properly advise a client to either withhold (but not to deliberately conceal) or pursue criminal prosecution consonant with the protection of the client's rights, and may advise a client that the client may, in an appropriate case and in good faith, request that authorities commence or dismiss criminal charges against another party, even though the client's objective is the receipt of compensation or the obtaining of some other redress from the other party."); see also Gillers, *supra* note 87, at 448.

107. One law professor and former prosecutor was quoted as saying, "No victim should be proud of herself for taking a dive in a criminal case, no matter how many zeros in a civil settlement." O'Driscoll, *supra* note 93. Another legal analyst for a news station was offended that an "exchange of money will take place between Kobe Bryant and his accuser which has been leveraged by this criminal prosecution to the extreme detriment to [sic] the taxpayers of Colorado." Nguyen & Harrison, *supra* note 67.

Ultimately, rape cases illustrate how law—be it the law of ethics or the law of courtroom procedure—has limited influence in a cultural milieu that distrusts, denies, or dismisses women’s accounts of rape. This is true not only because of the cultural forces promoting rape myths, but because of changes in communication, whereby the Internet and blogosphere can release information about the victim and the case, even if the rules of ethics and evidence might withhold such information. Protecting the name, identity, and sexual history of the victim via rules of evidence and ethics seems almost futile, at least in high-profile cases involving celebrities.

In tackling the issues of naming the victim, rape shield, and civil settlements of rape claims, this essay also illustrates two further dilemmas that emerge at the intersection of evidence, ethics, and rape. First, we must balance our concern for victim protection and privacy with respect for the victim’s independence, autonomy, and agency. If there are too many “special” rules just for women, we run the risk of perpetuating stereotypes and signaling women’s helplessness through our paternalism. Second, despite whatever sympathies we have for victims of sexual crimes, we must balance those feelings with a dedication to the presumption of innocence and a commitment to the rights of anyone accused of a crime to confront witnesses, including the right to ask the star witness against him tough, and perhaps uncomfortable, questions.