

2005

## Bearing the Cross

Tom Lininger

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Tom Lininger, *Bearing the Cross*, 74 Fordham L. Rev. 1353 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol74/iss3/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Bearing the Cross

### Cover Page Footnote

B.A., Yale; J.D., Harvard; Assistant Professor, University of Oregon School of law. I thank Sarah Buel, Carol Chase, George Fisher, Richard Friedman, John Langbein, Miguel Mendez, Jennifer Mnookin, Myrna Raeder, Deborah Rhode, and Merle Weiner for their helpful guidance. Eric Mitton's assistance with my early research was invaluable. Of course, I am solely responsible for any mistakes in this Article.

# ARTICLE

## BEARING THE CROSS

Tom Lininger\*

### INTRODUCTION

American legal culture seems to revere cross-examination.<sup>1</sup> According to Wigmore, cross-examination is our greatest invention for truth seeking.<sup>2</sup> Cross-examination is the purest expression of our adversarial process. It is the highlight of the trial for both jurors<sup>3</sup> and lawyers.<sup>4</sup> It is the moment in litigation when the best lawyers distinguish themselves. Many theorists believe that a lawyer's highest ethical duty is to cross-examine zealously.<sup>5</sup>

Hollywood celebrates cross-examination as well. From Atticus Finch<sup>6</sup> to Henry Drummond,<sup>7</sup> our heroes on the silver screen reach their zenith during

---

\* B.A., Yale; J.D., Harvard; Assistant Professor, University of Oregon School of Law. I thank Sarah Buel, Carol Chase, George Fisher, Richard Friedman, John Langbein, Miguel Mendez, Jennifer Mnookin, Myrna Raeder, Deborah Rhode, and Merle Weiner for their helpful guidance. Eric Mitton's assistance with my early research was invaluable. Of course, I am solely responsible for any mistakes in this Article.

1. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 833 n.31 (1985) (contending that American esteem for cross-examination is "an article of faith"); Chris W. Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 Stan. L. Rev. 291, 333-34 (2004) (discussing our legal culture's uncritical confidence in cross-examination).

2. 2 John H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1367, at 1697 (1904).

3. *State v. Lyon*, 744 P.2d 231, 240 (Or. 1987) (en banc) (extolling "[t]he cherished courtroom drama of confrontation"); Daniel M. Kotin, *Ten Tips for Successful Cross-Examination*, Chi. Bar Ass'n Rec., Feb.-Mar. 1996, at 12 ("A strong cross-examination can be the most dramatic part of a trial.").

4. Elizabeth A. Foley et al., *Jury Challenges—Communication and Legal Perspectives*, in *ATLA Winter Convention Reference Materials* (2004), available at WINTER2004 ATLA-CLE 233 (on www.westlaw.com) (citing survey indicating that lawyers rank cross-examination among their favorite parts of trial).

5. *E.g.*, Alan M. Dershowitz, *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System* 145 (1996) (stating that defense lawyers are ethically bound to use even distasteful tactics where necessary to advance their clients' interests); Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 Fordham L. Rev. 1717, 1727 (2002) (extolling zealous advocacy by lawyers); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Horrible Things*, 28 Hofstra L. Rev. 925, 930-34, 954 (2002) (defending zealous cross-examination of an alleged victim in a hate crime prosecution).

6. Atticus Finch, played by Gregory Peck, was the defense attorney in *To Kill a Mockingbird*, a 1962 movie based on a Pulitzer Prize-winning novel by Harper Lee. The American Film Institute ranks Finch as the greatest film hero in the last hundred years.

cross-examination. What great movie locates its drama in a direct examination?

Exactly one century after Wigmore's famous panegyric, the U.S. Supreme Court recently resumed the encomium for cross-examination. In *Crawford v. Washington*,<sup>8</sup> Justice Scalia's majority opinion recounted the English legal history that "burned into the general consciousness the vital importance of the rule securing the right of cross-examination."<sup>9</sup> Justice Scalia lauded cross-examination as our best tool for testing the veracity of witnesses.<sup>10</sup> Yet cross-examination is not simply a means to an end, wrote Justice Scalia. It is an end in itself. There may be other possible methods of ascertaining truth, but they cannot supplant cross-examination.<sup>11</sup> Indeed, in a criminal trial, a defendant's right to cross-examination is no less sacred than his right to a jury trial.<sup>12</sup>

This Article explores the darker side of cross-examination. *Crawford* is both a paean to cross-examination and a pain to the cross-examined. The renewed ardor of confrontation after *Crawford* may enhance the adversarial system in the aggregate, but this salutary effect is little consolation to the witness undergoing a grueling interrogation. A nonparty witness in a criminal trial has the worst of both worlds. She must endure difficult questioning, but as a nonparty, she has no opportunity to turn the tables on

---

American Film Institute, AFI's 100 Years . . . 100 Heroes and Villains, <http://afi.com/Docs/tvevents/pdf/handv100.pdf> (last visited Oct. 18, 2005). Finch's "deft, courtly, and persistent cross examination" revealed the innocence of his client in a rape trial, but Finch could not prevent the biased jury from reaching a guilty verdict. Steven Lubet, *Reconstructing Atticus Finch*, 97 Mich. L. Rev. 1339, 1340 (1999). Lubet noted that Finch's cross-examination exploited prejudices about women and sex crimes. *Id.* at 1350-55.

7. In the 1960 film *Inherit the Wind*, based on the Scopes trial, Spencer Tracey played Henry Drummond, the fictionalized version of Clarence Darrow. Drummond defended a schoolteacher who was arrested for teaching evolutionary theory. Drummond persuaded the prosecuting attorney to take the stand, and Drummond's devastating cross-examination was "among the best moments in the history of American cinema." David Ray Papke, *Law, Cinema, and Ideology: Hollywood Legal Films of the 1950s*, 48 UCLA L. Rev. 1473, 1479 (2001).

8. 541 U.S. 36 (2004).

9. *Id.* at 46 (citation omitted).

10. *Id.* at 61-62.

11. Justice Scalia in *Crawford v. Washington* wrote as follows:

To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

*Id.* at 61.

12. *See id.* at 62.

the client of her interlocutor.<sup>13</sup> Worse still, she must depend on someone else's attorney to object if the questions asked of her are improper.<sup>14</sup>

Cross-examination is particularly agonizing for accusers in prosecutions of domestic violence and sexual assault. The success of these prosecutions usually depends on the accusers' credibility. The prosecution frequently has no witness other than the alleged victim.<sup>15</sup> In a "he said, she said" contest, the defendant will naturally attempt to shift the focus from his own conduct to the foibles of the alleged victim.<sup>16</sup> Psychological counseling, parallel civil litigation, recent sexual history, emotional frailty—all are fair game for cross-examination by defense counsel under current law. It's a simple strategy: Try the accuser.<sup>17</sup>

The characterization of cross-examination as "revictimization" is hardly a fresh insight.<sup>18</sup> What's worth noting, however, is that circumstances over the last few years have dramatically increased the extent and difficulty of the cross-examination that accusers face in prosecutions of domestic violence and sexual assault.

In 2004 and 2005, a series of Supreme Court rulings increased the likelihood that accusers will need to testify, and widened the scope of

13. See Fed. R. Evid. 611, 614 (allowing parties and judges to examine witnesses); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 6.54 (3d ed. 2003) (noting that witnesses are examined by parties).

14. Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 New Eng. J. on Crim. & Civ. Confinement 331, 362 (2005) (noting that rape victims generally do not have their own attorneys when they testify in prosecutions of their assailants).

15. Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 Fordham L. Rev. 263, 302 n.171 (2002) (stating that in rape cases, there are usually no other witnesses beyond the alleged victim and the defendant); Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 Harv. Women's L.J. 263 (1997) (noting that an accuser's credibility is crucial in domestic violence cases because there are generally no witnesses other than the accuser and the accused).

16. For ease of reference, and to follow conventions in the literature, this Article will use female pronouns for accusers and male pronouns for defendants. Most victims of domestic violence are female. Matthew R. Durose et al., Bureau of Justice Statistics, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, No. NCJ 207846, at 31-32 (2005). Most victims of rape and sexual assault are female as well. Shannan M. Catalano, Bureau of Justice Statistics, *Criminal Victimization, 2003*, No. NCJ 205455, at 7-8 (2004). Notwithstanding the preponderance of women among victims and the use of female pronouns herein, this article's analysis of cross-examination applies with equal force to male victims.

17. John Q. La Fond & Bruce J. Winick, *Sex Offenders and the Law*, 4 Psychol. Pub. Pol'y & L. 3, 17 (1998) (discussing the common defense strategy of "trying the victim" in rape cases); see *infra* Part II.B-G.

18. See generally *State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997) ("It has been said that the victim of a sexual assault is actually assaulted twice—once by the offender and once by the criminal justice system."); Andrew E. Taslitz, *Rape and the Culture of the Courtroom* 111 (1999) (discussing the "second rape of victims by defense counsel"); Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 Nw. U. L. Rev. 914, 955-56 (1994) (decrying the character assassination by defense attorneys in rape trials).

matters that accusers must discuss at trial.<sup>19</sup> This Article's recent survey of sixty-two prosecutors' offices and twenty-two state sentencing commissions confirmed the effect of the Supreme Court's rulings.<sup>20</sup> These decisions have led prosecutors to call more accusers as witnesses in order to satisfy the Supreme Court's latest interpretation of the Sixth Amendment.<sup>21</sup> The decisions have restructured sentencing proceedings, requiring the submission of more sentencing issues to juries, and necessitating more testimony by accusers.<sup>22</sup> The decisions have created more uncertainty in evidence law and sentencing law, enticing a growing number of defendants to forego plea agreements and proceed to trial, if only to preserve the defendants' appellate rights.<sup>23</sup> More trials, of course, mean more cross-examination of accusers.

At the same time that the Supreme Court has necessitated more extensive trial testimony by victims of domestic violence and sexual assault, a number of other recent developments have exacerbated the stress that cross-examination causes for accusers.<sup>24</sup> Privilege laws that formerly protected accusers are eroding. The prosecutions of Kobe Bryant and other celebrities have demonstrated the weakness of rape shield laws, and have shown the entire nation that the best defense is to vilify the accuser. The general increase in sentences for domestic violence and rape—while surely commendable—has led defendants to examine accusers more vigorously due to the higher stakes. A higher number of accusers do not speak English and feel uncomfortable in court due to cultural differences. Media coverage of rape trials has grown, while the media's forbearance on matters of accusers' privacy has waned. Finally, the new case law requiring victims' participation at trial invites defendants to make cross-examination so unpleasant that victims will decline to cooperate with the government, necessitating dismissal of charges.

The victims' rights movement has complicated matters.<sup>25</sup> On the one hand, the leaders of this movement deserve credit for promoting understanding of victims' plight. On the other hand, the victims' rights movement has ironically compounded the hardship of cross-examination by

---

19. These three decisions are *Crawford v. Washington*, 541 U.S. 36 (2004), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005). For a detailed discussion of these cases and their impact on cross-examination, see *infra* Part II.A.

20. The survey of prosecutors, conducted in 2004 and 2005, involved sixty-two prosecutors' offices in California, Oregon, and Washington. These offices collectively have jurisdiction for ninety percent of the three states' populations. The questions and answers from the survey of prosecutors are set forth in Appendix A. The survey of state sentencing commissions, conducted in the summer and fall of 2005, involved the executive directors of all the state sentencing commissions in the United States, along with the sentencing commission in the District of Columbia. The questions and answers from that survey are set forth in Appendix B.

21. See *infra* Part II.A.1.

22. See *infra* Part II.A.2.

23. See *infra* Part II.A.2.

24. These various factors are discussed *infra* in Parts II.B-F.

25. See *infra* Part II.G.

creating more junctures for victims' testimony at trial while failing to ameliorate the ordeal of cross-examination.<sup>26</sup> Victims' advocates in some states have lobbied to pass constitutional amendments that foreclose pretrial depositions of victims by the defense.<sup>27</sup> Such rules disregard the advice of battered women's activists and scholars who see pretrial testimony as an opportunity for victims to avoid the trauma of trial while allowing the confrontation required by the Sixth Amendment.<sup>28</sup>

Why should policymakers and courts worry about the growing asperity of cross-examination? As a general matter, victims' willingness to report crimes varies inversely with their fear of embarrassment during cross-examination.<sup>29</sup> The recognition of this phenomenon led to the passage of the first rape shield laws three decades ago.<sup>30</sup> There is some evidence that victims' fear of testifying has increased recently. Data released by the U.S. Bureau of Justice Statistics in June 2005 indicate that privacy concerns have become a more significant deterrent to the reporting of violence committed

---

26. In many states, victims' rights advocates have fought to make victims' voices heard in criminal prosecutions. See generally Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & Pol'y 229, 239-42 (2005) (noting the trend to interject victim testimony more frequently in criminal prosecutions). Typically the spokespeople for these campaigns are the relatives of children who have been murdered or kidnapped. These spokespeople do not have much to fear in cross-examination, because their credibility is not a central issue; defense counsel would be foolish to attack them and thereby alienate the jury. These spokespeople have sought to create more opportunities for testimony by victims and families at various stages of the prosecution. The movement has devoted comparatively little attention to reforms that would mitigate the hardship of cross-examination for accusers in prosecutions of domestic violence and sexual assault. See *infra* Part II.G.

27. E.g., Ariz. Const. art. 5 (adopted in 1990); Idaho Const. art 1, § 22(8) (adopted in 1994); La. Const. art. 1, § 25 (adopted in 1998); Or. Const. art. 1, § 42(1)(c) (adopted in 1999).

28. Nicole A.F. Lindenmyer, *Washington v. Crawford: Must Crime Victims Testify Against the Defendant?* 4 (2004) (unpublished manuscript), available at <http://www.bwlap.org/taps/crawford.pdf> (noting that depositions are less stressful for victims than trial testimony, and encouraging prosecutors to arrange for pretrial depositions of victims as a means of satisfying confrontation requirements); see Tom Lininger, *Prosecuting Batters After Crawford*, 91 Va. L. Rev. 747, 784-97 (2005) (suggesting that greater pretrial confrontation of accusers would ease their burden after *Crawford*); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 610-12 (2005) (advocating greater use of pretrial hearings to provide the confrontation required by *Crawford*).

29. Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 Vill. L. Rev. 907, 936-37 (2001) (listing studies supporting the proposition that victims' reluctance to report rape goes up when cross-examination at trial is more difficult); Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 142 Educ. L. Rep. 11, 23, 29-30 (2000) (noting that in college disciplinary hearings adjudicating allegations of date rape, the victims' willingness to file complaints depends on the extent of adversarial examination).

30. 23 Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5382 (2005) (analyzing the policy behind the federal rape shield law, and noting proponents' concern that rape victims who feared embarrassment at trial would not seek charges against their assailants); Cristina C. Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 Drake L. Rev. 45, 53-60 (2002) (reviewing the legislative history of federal rape shield law).

by family members and intimate partners.<sup>31</sup> Victims' advocates in particular areas of the country have noticed that an increasing number of rape victims seek counseling but do not report the rapes to police due to fears about testifying at trial.<sup>32</sup> Paradoxically, victims' aversion to trial testimony makes them more vulnerable to repeated assaults.

The time has come to reconceptualize cross-examination in prosecutions of domestic violence and sexual assault. The simple adversarial model does not capture the complexity of trial dynamics and the multiplicity of interests in the courtroom. A better model posits a trilateral adversarial process, in which the defense, the prosecution, and the accuser all vie against one another. The divergence of prosecutors' and accusers' interests has become plain; just ask the battered woman jailed by the prosecutor on a material witness warrant, or the rape victim who never heard an objection as defense counsel recounted her sexual history, or the victim whom the prosecution impeached ardently when she deviated from the "script."<sup>33</sup> So long as the rules of evidence and courtroom procedure remain aligned along a bipolar axis, the interests of the accuser will not receive the attention that they deserve.

The challenge for policymakers is to fashion new rules for courtroom procedure that will respect defendants' confrontation rights while reducing accusers' anxiety about cross-examination. This Article presents a comprehensive package of such proposals. Accusers should have separate counsel with standing to object. Accusers need stronger evidentiary

---

31. Among women who declined to report violent crimes committed against them by intimates (defined as current and former spouses and boyfriends), the percentage citing privacy concerns has grown considerably in recent years. A 1998 report indicated that 15.4% of non-reporting victims cited privacy concerns as the reason for their reluctance to file complaints against their assailants. A follow-up report in June 2005 indicated that 33.8% of non-reporting victims cited privacy concern as their reason for not filing complaints against assailants who were boyfriends or girlfriends; 25.1% of non-reporting victims cited privacy concerns as their reason for not reporting violent crimes committed against them by spouses. Compare Lawrence A. Greenfield et al., Bureau of Justice Statistics, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, No. NCJ-167237, at 19 (1998) (setting forth data for the years 1992 through 1996), with Durose et al., *supra* note 16, at 26 (setting forth data for the years 1998 through 2002).

32. Elaine D'Aurizio, *Kobe Bryant Rape Case Seen Having a Chilling Effect*, Rec. N. N.J., June 15, 2004, at A1 (faulting the Bryant case for underreporting of rape); Blaine Harden, *Bryant Case Is Called a Setback*, Wash. Post, Sept. 3, 2004, at A8 (stating that employees at Rape Victim Advocates of Chicago—the largest rape crisis center in the Midwest—reported that rape victims sought counseling but did not want to press charges due to fears related to the Bryant case); Cathy Maestri & Ben Goad, *Southern California Activists Decry Bryant Decision*, Riverside Press-Enterprise, Sept. 3, 2004, at A01 (stating that in Riverside, California, there was no decline in the number of rape victims seeking counseling, but the number of victims willing to press criminal charges did decline due to fears about the ordeal of trial); *CBS Evening News* (CBS television broadcast Jan. 23, 2004), available at 2004 WL 74303558 (noting that reports of sexual assault at the University of Northern Colorado, where Bryant's accuser was a freshman, dropped twenty-five percent after the case broke and the victim's character was impugned; local victims' advocates indicated that assaults had not dropped, but victims' willingness to report had decreased).

33. See *infra* Part IV.A.



privileges, better rape shield laws, pretrial notice of certain impeachment strategies, and the right to testify in narrative form at intervals during cross-examination. The rules of evidence should allow more liberal use of prior consistent statements, should prohibit impeachment of accusers by reference to parallel civil suits, and should place more sensible constraints on the introduction of “prior bad acts” against both accusers and defendants. Pro se defendants should not be able to cross-examine accusers directly. Sentencing guidelines should not condition “acceptance of responsibility” upon assistance to the prosecutor, but rather upon the defendant’s conduct vis-à-vis the accuser at trial. Finally, legislatures should impose severe criminal penalties for disclosure of sensitive information about accusers derived from in camera hearings adjudicating motions in limine.

A victim of domestic violence or sexual assault should not be the fulcrum upon which courts balance the interests of prosecution and defense. Such an instrumental conception of the victim offends Kantian deontological notions of moral autonomy.<sup>34</sup> And even Bentham would recognize the pragmatic problem: A criminal justice system that scares off victims will soon be out of business.<sup>35</sup>

#### I. THE CRUCIBLE OF CROSS-EXAMINATION IN PROSECUTIONS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT

Before exploring the recent developments that have heightened accusers’ fear of cross-examination in prosecutions of domestic violence and sexual assault, it is important to consider the baseline circumstances that have always made cross-examination difficult for accusers in such prosecutions. The literature on this topic is extensive, but a brief summary will set the stage for the analysis that follows.

Perhaps the most important reason for accusers’ aversion to cross-examination is the lingering stress of victimization. Research indicates that a high proportion of accusers who have suffered domestic violence and sexual assault will continue to experience posttraumatic stress disorder at the time of trial.<sup>36</sup> The accuser must “relieve” her victimization at trial.<sup>37</sup> In

34. Immanuel Kant scorned utilitarianism, propounding instead a duty-based philosophy of morality whereby an individual could never be a means to another end. Immanuel Kant, *Groundwork of the Metaphysics of Morals* 96 (Allen W. Wood trans., Yale Univ. Press 2002) (1785).

35. The founding father of utilitarian philosophy was Jeremy Bentham, who insisted that every proposal be judged according to the extent to which it advances aggregate societal utility, with no concern for deontological theory. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 11-12 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1823).

36. Nat’l Victim Ctr. & Crime Victims Research and Treatment Ctr., Med. Univ. of South Carolina, *Rape in America* 7 (1992) [hereinafter *Rape in America*] (describing that a four-year national study of rape victims found that thirty-one percent developed Post-traumatic Stress Syndrome (“PTSD”), thirty percent experienced a major depression, thirty-three percent had suicidal ideation, and thirteen percent actually attempted suicide); Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender Soc. Pol’y

many cases, the trial is the accuser's first face-to-face encounter with the assailant after the date of the offense. Some accusers may perceive cross-examination by the defense as yet another attack by the defendant (through the proxy of defense counsel).<sup>38</sup>

Another circumstance exacerbating victims' plight at trial is a pervasive sexist stereotype. Some jurors and judges believe that domestic violence is a natural occurrence in families,<sup>39</sup> or that women who wear certain clothes invite sexual assault, or that some women simply fabricate accusations of rape.<sup>40</sup> According to Professor Susan Estrich, herself a rape victim, "the law's abhorrence of the rapist . . . has been matched only by its distrust of the victim."<sup>41</sup> People with very conservative morals may believe that a woman with extensive sexual history would be unlikely to have withheld consent on the night of the charged offense. Defense attorneys may attempt to pander such biases in their cross-examination.<sup>42</sup>

& L. 465, 474 (2003) (citing studies indicating that forty percent of accusers in domestic violence prosecutions suffer from PTSD, and eighty percent suffer from clinically diagnosable depression); Julie Goldscheid, *Crime Victim Compensation in a Post-911 World*, 79 Tul. L. Rev. 167, 207-08 n.202 (2004) (collecting studies indicating that victims of domestic violence suffer from PTSD).

37. Tracey A. Berry, *Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 Wis. L. Rev. 1237, 1245 ("At trial, she must relive the experience in front of a roomful of people consisting of friends, family, strangers, authority figures, and, most significantly, her attacker."); James H. DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 4 Hous. L. Rev. 1205, 1271 (2004) (noting that rape prosecutions force victims to relive their truth); Epstein et al., *supra* note 36, at 475 ("Repeatedly coming to court or having to discuss the abuse to attorneys and others may be very difficult for a victim who is trying to avoid thinking about the brutality she has experienced.").

38. Psychiatrist Judith Herman put it aptly: "If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law." Judith L. Herman, *Trauma and Recovery: The Aftermath of Violence* 72 (1972).

39. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 39-44 (1999) (discussing judges' and clerks' instinctive distrust of battered women, and proposing judicial education to address this problem); Michelle Maxian, N.Y. City Legal Aid Soc'y, Comments at the Brooklyn Law Review Symposium: *Crawford v. Washington: The Future of the Confrontation Clause in Light of its Past* (Feb. 18, 2005) (transcript on file with author) ("I would stand up [in domestic violence cases] and the judge would say to me, 'Are they related?' And I would say, 'Yes.' And the judge would dismiss.").

40. John H. Wigmore, Evidence in Trials at Common Law § 924a, at 736 (James H. Chadborne ed., 1970) (suggesting that women tend to make up fantastic stories about rape, and mental examinations are advisable in rape cases); Jennifer L. Hebert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 Tex. L. Rev. 1453, 1456-57 (2005) (discussing prejudices of judges and jurors in rape prosecutions).

41. Susan Estrich, *Real Rape* 4 (1987).

42. Timothy Beneke, *Men on Rape* 104-05 (1982).

If I could get my client off by appealing to the jury's sexism I probably would, because I'd be more concerned with this one guy and his freedom than the ethical issue of sexism. If I didn't appeal to their sexism and I thought I could've to get my client off, and he went to prison, I probably would feel pretty bad about it.

*Id.* at 105.

One other factor has vexed accusers for decades: the centrality of the accuser's credibility to the government's case. In most prosecutions of domestic violence or sexual assault, the key question is whether the jury believes the accuser's or the defendant's version of the facts. The prosecution rarely has the option of calling a third party who observed the acts at issue in these prosecutions;<sup>43</sup> if such a witness had been present, the case probably would not have proceeded to trial. Because the accuser's credibility is the linchpin of the government's case, she can expect more extensive cross-examination than an accuser would typically face in prosecutions relying more heavily on physical evidence or third-party witnesses.

The victim's prior relationship with the assailant also complicates prosecutions of domestic violence and sexual assault. Approximately eighty percent of rape victims know their assailants.<sup>44</sup> Domestic violence, by definition, involves an assault by a family member or intimate partner.<sup>45</sup> The accuser's prior familiarity with the accused makes trial especially difficult, and creates pressures for the accuser to recant or refuse to participate. These pressures do not exist to the same degree in prosecutions of other violent crime, in large part because a much higher percentage of the perpetrators are strangers.

Accusers in prosecutions of domestic violence and rape also anguish over the highly sensitive nature of impeachment material in those cases. While a victim of a bar fight may face questions about his sobriety, and a victim of armed robbery may be grilled about his inability to discern the features of the masked robber, the victim of domestic violence or sexual assault faces an altogether different category of impeachment. Her most private affairs—including her past romantic relationships, her sexual mores, her psychological fortitude, and her loyalty to family members—are possible grounds on which to attack her credibility.<sup>46</sup> Cross-examination in these cases is tantamount to public psychoanalysis.

---

43. Charlow, *supra* note 15, at 302 n.171 (noting that in rape cases, there are usually no other witnesses beyond the alleged victim and the defendant); St. Joan, *supra* note 15, at 304 (stating that the accuser's credibility is crucial in domestic violence cases because there are generally no witnesses other than the accuser and the accused).

44. Rape in America, *supra* note 36, at 4 (noting that among the non-stranger rapes, 11% were committed by a father/stepfather, 9% by a husband/ex-husband, 16% by other relatives, and 29% by nonrelatives).

45. See Epstein et al., *supra* note 36, at 479 (discussing victims' continuing emotional attachment to batterers).

46. E.g., Wendy J. Murphy, *Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 New Eng. L. Rev. 983, 996-1002 (1998) (discussing harm to accusers in prosecutions of domestic violence and sexual assault when courts admit highly sensitive information for impeachment); Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. Pa. L. Rev. 1373, 1388-97 (2005) (describing misuses of psychological evidence in prosecutions of sexual assault).

Over the last two decades, “no drop” policies in many prosecutors’ offices have added to victims’ sense of frustration during cross-examination. These policies require that prosecutors persist with certain categories of cases even when victims urge the government to drop the charges.<sup>47</sup> Such policies cause a tense relationship between the prosecutor and the victim, sometimes necessitating that the prosecution impeach its own witness.<sup>48</sup> Defendants, for their part, seek to exploit the fissures on the government’s side, and defense attorneys devote large portions of cross-examination to exposing victims’ vacillations. It is conceivable that the victim could be declared hostile by both the government and the defendant, and could be cross-examined vigorously by both.<sup>49</sup>

Any discussion of accusers’ ordeals during cross-examination must emphasize the heavy-handed tactics used by lawyers. The conventional wisdom in the defense bar is that harsh cross-examination of accusers offers the best—and perhaps the only—means of exonerating the accused.<sup>50</sup> Prosecutors also have treated accusers in a callous manner.<sup>51</sup> As the prosecutor mentioned to the rape victim in the movie *The Accused*, “I’m not a rape counselor. I’m a prosecutor.”<sup>52</sup> Many prosecutors, fearing the victims’ potential recusal, come to regard accusers as saboteurs.<sup>53</sup> Few other categories of accusers have such unpleasant relations with both prosecutors and defense attorneys.

The foregoing summary has highlighted some of the factors that have long exasperated accusers in prosecutions of domestic violence and sexual assault. Against the backdrop of these longstanding difficulties the analysis will now turn to more current trends.

---

47. Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1865-71 (2002) (summarizing the evolution of “no-drop” policies in the 1980s and 1990s); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849 (1996) (considering “no drop” policies within the framework of feminist theory).

48. Federal Rule of Evidence (“FRE”) 607 allows the impeachment of a witness by the party calling the witness. Fed. R. Evid. 607.

49. FRE 611 authorizes the judge to allow cross-examination of a witness deemed hostile, even if the party seeking to cross-examine the witness called the witness in the first place. Fed. R. Evid. 611.

50. Taslitz, *supra* note 18, at 82-99 (analyzing defense attorneys’ use of language in rape trials).

51. Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 Fordham Urb. L.J. 953, 962 (2000) (“The relationship between a prosecutor and a victim often parallels that of the batterer and the victim.”).

52. Stacy Caplow, *Still in the Dark: Disappointing Images of Women Lawyers in the Movies*, 20 Women’s Rts. L. Rep. 55, 69 (1999) (quoting *The Accused* (Paramount Pictures 1988)).

53. E.g., Laurence Busching, N.Y. City Law Dep’t, Remarks at Brooklyn Law Review Symposium: *Crawford v. Washington: The Future of the Confrontation Clause in Light of Its Past* (Feb. 18, 2005) (transcript on file with author) (stating his belief that domestic violence victims usually try to sabotage the prosecution at trial); see *infra* Part IV.A (suggesting that accusers retain independent counsel).

## II. RECENT DEVELOPMENTS COMPOUNDING THE DIFFICULTY OF CROSS-EXAMINATION

The last few years have seen an increase in the hardship experienced by accusers in prosecutions of domestic violence and sexual assault. This phenomenon has two dimensions: First, the necessity for victims' testimony at trial has grown; and second, the trauma of cross-examination has increased. The following sections focus on some of the particular factors that have brought about these changes.

### A. *Supreme Court Rulings in 2004-05*

Three decisions by the U.S. Supreme Court in a twelve-month period have dramatically altered the procedural and evidentiary rules in criminal trials. These cases are *Crawford v. Washington*,<sup>54</sup> *Blakely v. Washington*,<sup>55</sup> and *United States v. Booker*.<sup>56</sup> All three opinions interpret the Sixth Amendment to impose new duties on prosecutors—duties that carry significant consequences for accusers as well.

#### 1. *Crawford*

On March 8, 2004, the U.S. Supreme Court reversed the conviction of Michael Crawford because the trial court in Washington State had admitted hearsay statements by a declarant whom Crawford could not cross-examine. The trial court had applied the Supreme Court's prior jurisprudence to conclude that the statement at issue—a declaration against interest by Crawford's wife—was sufficiently reliable that it did not require further testing by cross-examination.<sup>57</sup> Justice Scalia, writing for the *Crawford* majority, insisted that cross-examination is necessary for any "testimonial" hearsay statement offered against the accused.<sup>58</sup> The *Crawford* opinion did not clearly explain the definition of "testimonial." This term seems to encompass—more or less—statements made under circumstances that would lead a reasonable declarant to foresee their later use in a criminal prosecution.<sup>59</sup>

The *Crawford* ruling is commendable from a doctrinal standpoint, but it has hindered the prosecution of certain cases, especially cases involving domestic violence.<sup>60</sup> Approximately eighty percent of domestic violence

---

54. 541 U.S. 36 (2004).

55. 542 U.S. 296 (2004).

56. 125 S. Ct. 738 (2005).

57. *Crawford*, 541 U.S. at 40-41.

58. *Id.* at 68.

59. *Id.* at 51-52.

60. Wendy N. Davis, *Hearsay, Gone Tomorrow?: Domestic Violence Cases at Issue as Judges Consider Which Evidence to Allow*, A.B.A. J., Sept. 2004, at 22; Robin Franzen, *Ruling on Hearsay Evidence Hurts Cases: Prosecuting Abuse and Domestic Violence Will be Harder After the Supreme Court's Affirmation of the Right to Face an Accuser*, The Oregonian (Portland), Mar. 11, 2004, at A1; David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Slate, Mar. 12, 2004,

victims recant or refuse to cooperate after initially filing criminal complaints.<sup>61</sup> These victims change their stories for a variety of reasons: economic dependence on the batterer, fear of reprisals, lack of confidence in the criminal justice system, enduring affection for the defendant, or perhaps the realization that the initial complaint was baseless.<sup>62</sup> Prior to *Crawford*, prosecutors dealt with mercurial victims by offering their out-of-court statements through various hearsay exceptions such as the excited utterance exception, the exception for statements to medical personnel, and specialized exceptions for domestic violence cases.<sup>63</sup>

*Crawford* has constrained the use of such hearsay exceptions and necessitated more testimony by accusers at trial.<sup>64</sup> According to the majority opinion in *Crawford*, the government may not offer testimonial hearsay against the defendant unless the declarant is available for cross-examination at some point, either before or during trial.<sup>65</sup> This Article's

<http://www.slate.com/id/2097041>. The survey of sixty-two prosecutors' offices in California, Oregon, and Washington found that the *Crawford* decision significantly impeded the prosecution of domestic violence in sixty-three percent of these jurisdictions. *See infra* app. A (question 1).

61. *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004); accord Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002) (noting that eighty to ninety percent of domestic violence victims do not cooperate with prosecutors); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 367 (1996) (stating that victims' noncooperation rate in domestic violence prosecutions is between eighty and ninety percent). In the present Article's survey of sixty-two prosecutors' offices, ninety-one percent of respondents indicated that victims of domestic violence are likely to be uncooperative when subpoenaed as witnesses in prosecutions of their assailants. *See infra* app. A (question 13).

62. Epstein et al., *supra* note 36, at 476-82 (listing six "relational factors" that affect the willingness of battered women to testify against their accusers); Lininger, *supra* note 28, at 769-70 (listing reasons why battered women recant or refuse to cooperate after initially complaining to police).

63. Celeste E. Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After Crawford v. Washington*, 24 Rev. Litig. 409, 416 (2005) (discussing the importance of the excited utterance exception in domestic violence prosecutions before *Crawford*); Judges Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of Crawford v. Washington*, Juv. & Fam. Just. Today, Summer 2004, at 20, 20-22 (noting that admission of hearsay evidence in domestic violence cases was commonplace before *Crawford*); Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, Crim. Just., Summer 2005, at 24 (summarizing prosecutorial strategies in the era preceding *Crawford*).

64. For example, eighty-seven percent of respondents in the survey of prosecutors' offices reported that they had greater difficulty introducing domestic violence victims' hearsay statements to officers responding to the scene. *See infra* app. A (question 11).

65. Of course, the scope of the term "testimonial" is the crucial consideration here. Some courts have found that the term testimonial excludes statements by victims in 911 calls, because the victims' primary concern is to summon help, not to launch criminal prosecutions. *E.g.*, *People v. Caudillo*, 19 Cal. Rptr. 3d 574, 590 (Ct. App. 2004); *State v. Wright*, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004); *People v. Moscat*, 777 N.Y.S.2d 875, 879-80 (Crim. Ct. 2004); *State v. Davis*, 111 P.3d 844, 849 (Wash. 2005). Other courts have found that victims' statements to police who have just arrived on the scene are not testimonial, because the victims are too excited to consider the future prosecutorial use of

recent survey of sixty-two prosecutors' offices in California, Oregon, and Washington measured the effect of *Crawford* on prosecutors' trial strategies in domestic violence cases.<sup>66</sup> Before *Crawford*, fifty-four percent of respondents offered testimonial hearsay in more than half of all domestic violence prosecutions.<sup>67</sup> After *Crawford*, this number shrunk to thirty-two percent.<sup>68</sup> The survey revealed that eighty percent of respondents were more likely to call domestic violence victims as witnesses after *Crawford*.<sup>69</sup> Some anecdotal evidence indicated that prosecutors have begun incarcerating victims on material witness warrants to ensure that they will be available for trial as required by *Crawford*.<sup>70</sup>

*Crawford* has essentially made the victim's live testimony the *sine qua non* of criminal prosecution,<sup>71</sup> and victims find their indispensable role

their statements, and/or the officers are more concerned with securing the scene than gathering evidence. *E.g.*, United States v. Luciano, 414 F.3d 174, 179-80 (1st Cir. 2005); United States v. Brown, 322 F. Supp. 2d 101, 104 n.4 (D. Mass. 2004); Hammon v. State, 829 N.E.2d 444, 452-53 (Ind. 2005); State v. Barnes, 854 A.2d 208, 209-12 (Me. 2004); State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004). For an excellent article urging a narrow construction of the term "testimonial," see Carol Chase, *Is Crawford a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 Or. L. Rev. (forthcoming 2006).

66. The survey was conducted by telephone and e-mail from October 2004 through January 2005. The complete set of questions appears in Appendix A. The questions were posed to the lead domestic violence prosecutor in each jurisdiction, or, in the absence of such a prosecutor, to the elected prosecutor or some other attorney with substantial involvement in domestic violence cases. The survey elicited responses from twenty-three California counties (which collectively included eighty-eight percent of California's population), nineteen Oregon counties (which collectively included ninety-four percent of Oregon's population), and twenty-two Washington counties (which collectively included ninety-six percent of Washington's population).

67. See *infra* app. A (question 6).

68. See *infra* app. A (question 8).

69. See *infra* app. A (question 2).

70. For example, one respondent in the survey made the following comment:

The biggest impact we are having [as a result of *Crawford*] is that we are having to arrest victims who do not appear after being served. We don't do it in all of our cases, but we do it in the more serious cases. It is not something we want to do, but we have decided that it is the better alternative to dismissal. Unfortunately, some of the victims have had to remain in custody until the trial which is a TERRIBLE message we are sending to the victim, her children, the defendant and society. In the less serious cases we simply have had to dismiss them.

E-mail to Tom Lininger, Assistant Professor of Law, University of Oregon School of Law (Oct. 25, 2004, 10:34 PST) (on file with author) (response to survey on effects of *Crawford*). The survey gave all respondents anonymity in order to encourage candor.

71. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (requiring an opportunity for cross-examination if the government offers testimonial hearsay against the accused). Only where the defendant has procured the victim's absence may the court admit testimonial hearsay without some form of cross-examination. The doctrine of forfeiture by wrongdoing extinguishes the confrontation rights of a party that has, through wrongful conduct, procured the unavailability of the hearsay declarant. This doctrine appears in FRE 804(b)(6), and a growing number of states have codified the doctrine as well. *E.g.*, Cal. Evid. Code § 1350; Del. R. Evid. 804(b)(6); Haw. R. Evid. 804(b)(7); 725 Ill. Comp. Stat. 5/115-10.2(d) (1993); Mich. R. Evid. 804(b)(6); N.D. R. Evid. 804(b)(6); Or. R. Evid. 804(1)(e); Penn. R. Evid. 804(b)(6); S.D. R. Evid. 804(b)(6); Tenn. R. Evid. 804(a). Even in states without such a provision, the doctrine may be available as a matter of common law. *Reynolds v. United*

uncomfortable. Defendants and defense counsel are increasingly aware that *Crawford* necessitates victims' live testimony. Because few trials can go forward without the victims' testimony, the defense has an interest in making cross-examination extremely unpleasant for the victim, in the hope that she will lose interest in the case.<sup>72</sup> Indeed, the *Crawford* ruling "scares some victims from court" in domestic violence cases.<sup>73</sup> Statistical evidence shows that dismissals rose in Dallas and in the three western states surveyed when cross-examination became more harrowing as a result of *Crawford*.<sup>74</sup>

The turmoil in confrontation law engendered by *Crawford* has led defendants to forego guilty pleas so that they can preserve appellate rights. Most prosecutors require that a defendant give up the right to appeal when he signs a plea agreement. That price is too high to pay for many defendants, who would rather take their chances at trial and then gamble that the evolving constitutional jurisprudence will furnish a winning appellate argument.<sup>75</sup> In the survey of sixty-two prosecutors' offices, fifty-nine percent indicated that defendants are less likely to plead guilty in domestic violence prosecutions after *Crawford*.<sup>76</sup> Of course, fewer pleas mean more trials, and more trials mean more cross-examination of victims.

---

States, 98 U.S. 145, 158-59 (1878) (cited with approval in *Crawford*, 541 U.S. at 62). Some commentators believe that forfeiture by wrongdoing is prevalent in cases involving violence against women. Adam Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, Prosecutor, Nov.-Dec. 2004, at 14.

72. One of the reasons for the adoption of "no drop" policies in many jurisdictions was to prevent defendants from bullying accusers into demanding that prosecutors drop the charges. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1673 (noting that one purpose of "no drop" policies is to "reduce batterers' attempts to intimidate or retaliate against victims to keep them from proceeding"). When victims' hearsay was readily admissible, such intimidation of accusers was fruitless, because the prosecution could go forward without the victims' live testimony. Now the tighter confrontation requirements impede prosecutions when the victims are absent. *See infra* app. A (question 3) (finding that seventy-six percent of respondents indicated that they were more likely to dismiss domestic violence charges when the victim is unavailable or refuses to cooperate). In effect, *Crawford* may have ended the "no-drop" era in domestic violence prosecutions, and defendants may likely resume the abusive practices that predated the adoption of "no drop" policies.

73. Robert Tharp, *Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims From Court*, Dallas Morning News, July 6, 2004, at 1A.

74. *Id.* (noting that in the summer of 2004, one half of domestic violence cases set for trial in Dallas County were dismissed due to evidentiary problems attributed to *Crawford*). The present Article's survey found that seventy-six percent of the responding prosecutors' offices were more likely to dismiss domestic violence charges after *Crawford* when victims were unavailable or reluctant to cooperate. *See infra* app. A (question 3).

75. Appeal waivers are "standard" and "nearly universal" in plea agreements. Alan J. Chaset, *Improving the Federal Sentencing Guidelines: Can We Get There From Here?*, Champion, June 2004, at 6, 8 & n.5. As will be discussed in Part V.I, the Federal Rules of Criminal Procedure should prohibit prosecutors from requiring appeal waivers as a condition for entering into plea agreements.

76. *See infra* app. A (question 4).



## 2. *Blakely* and *Booker*

In *Blakely v. Washington*,<sup>77</sup> the Supreme Court reversed the trial court's imposition of a statutory sentencing enhancement in a domestic violence case because the prosecution had not proven the predicate facts to the jury, as required by the Sixth Amendment. The *Blakely* majority made clear that any fact forming the basis for an increase in the maximum sentence (other than a prior conviction) requires a jury finding of proof beyond a reasonable doubt.<sup>78</sup> In *United States v. Booker*,<sup>79</sup> the Supreme Court took this analysis one step further and held that the United States Sentencing Guidelines are advisory rather than mandatory.<sup>80</sup>

The Supreme Court's reformulation of sentencing law has set off a reaction throughout the United States as courts and legislatures consider new procedures to facilitate the required jury findings on sentencing issues. Some states are simply enlarging the sentencing parameters in their guidelines, so that judges will have more room to maneuver within these boundaries absent a jury finding that changes the maximum sentence.<sup>81</sup> Some jurisdictions are bifurcating jury proceedings into a guilt phase and a sentencing phase.<sup>82</sup> Other jurisdictions are requiring the prosecution to prove the factual basis for sentencing enhancements at the same trial in which the defendant is tried for the charged offense.<sup>83</sup>

How have *Blakely* and *Booker* affected cross-examination in prosecutions of domestic violence and sexual assault? To begin with, these decisions make sentencing unpredictable, and they therefore make trials more likely.

---

77. 542 U.S. 296 (2004).

78. *Id.* at 301-02; Stephen Bibas, *Blakely's Federal Aftermath*, 16 Fed. Sent'g Rep. 333 (2004) (analyzing *Blakely's* implications, and proclaiming that this ruling was "the Court's most earthshaking decision last Term").

79. 125 S. Ct. 738 (2005).

80. *Id.* at 750.

81. Alaska was one of the first states to take this approach after *Blakely*. Teri Carns, *Alaska Responds to the Blakely Case* (July 28, 2005) (unpublished manuscript, on file with author). As of October 2005, fourteen percent of jurisdictions with sentencing commissions had responded to *Blakely* with a "substantive fix" (i.e., enlargement of sentencing ranges in the guidelines grid). See *infra* app. B (question 5).

82. Kansas pioneered the bifurcated model after *Blakely*, and many other states have followed suit. As of October 2005, twenty-seven percent of states with sentencing commissions had responded to *Blakely* with a "procedural fix," that is, the submission of certain sentencing issues to the jury, and among those states, eighty-three percent have authorized bifurcated proceedings so that juries can consider the defendant's guilt or innocence in the first phase, and then consider sentencing issues in the second phase. See *infra* app. B (questions 5 and 6).

83. For example, Washington requires submission to the jury of sentencing issues that could increase the defendants' maximum sentence, but bifurcated jury proceedings are not used except in rare circumstances. Jason Amala & Jason Laurine, *An Exceptional Case: How Washington Should Amend Its Procedure for Imposing an Exceptional Sentencing in Response to Blakely v. Washington*, 28 Seattle U. L. Rev. 1121, 1129-39 (2005) (describing the Washington Legislature's response to *Blakely*). As of October 2005, sixty-seven percent of the states that responded to *Blakely* with a "procedural fix" instituted a new regime in which prosecutors can prove sentencing issues to the jury at trial. See *infra* app. B (questions 5 and 6).

Among jurisdictions with mandatory or presumptive sentencing guidelines, seventy-eight percent of respondents to this Article's recent survey indicated that the Supreme Court's decisions in *Blakely* and/or *Booker* have created uncertainty about the sentence that a defendant could expect if he took his case to trial.<sup>84</sup> The government's plea offers have become less attractive, because the possible sentences that would result from a trial or a plea are harder to predict and compare.<sup>85</sup> Further, this Article's survey shows that defendants are reluctant to waive appellate rights as is customary in a plea agreement, because defendants do not yet know how the dust will settle after *Blakely* and *Booker*.<sup>86</sup> In a speech on June 21, 2005, U.S. Attorney General Alberto Gonzales announced that *Blakely* and *Booker* could cause many more trials: "We risk a return to the pre-guidelines era, when defendants were encouraged to 'play the odds' in our criminal justice system, betting that the luck of the draw—the judge randomly assigned to the case—might result in a lighter sentence."<sup>87</sup> U.S. attorneys and local prosecutors echo this concern.<sup>88</sup> As the number of trials increases, a larger

---

84. See *infra* app. B (question 3). Jurisdictions with mandatory or presumptive sentencing guidelines include approximately twenty percent of the U.S. population. Among jurisdictions with advisory sentencing guidelines, no respondents to this Article's survey reported that *Blakely* or *Booker* increased the unpredictability of sentencing. See *infra* app. B (question 3).

85. In his important book, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, George Fisher argues that the enticement for plea bargaining is the predictability of sentencing, and that predictability depends in large part on the uniform application of sentencing guidelines and statutory sentencing enhancements. George Fisher, *Plea Bargaining's Truth: A History of Plea Bargaining in America* 223-29 (2003); see Alan Ellis et al., *Litigating in a Post-Booker World*, A.B.A. Crim. Just. Mag., Spring 2005, at 24, 27 (noting that *Booker* decreases incentives for plea agreements because prosecutors have less to offer); see also Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 924 (2004) (noting that pleas are more likely when prosecutors can offer a narrower range of possible sentencing outcomes compared to post-trial sentencing); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1259-60 (2004) (asserting that "the reality of the federal system is that sentencing power in individual cases is overwhelmingly a function of the prosecutor alone," due to operation of the sentencing guidelines and statutory sentencing parameters before *Blakely* and *Booker*); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1476 (1993) (noting that under the prior system, prosecutors' control of the charge meant control of the sentence, which significantly increased the likelihood of a plea). But see Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 Stan. L. Rev. 1721, 1739-40, 1740 n.32 (2005) (book review) (stating that *Blakely* and *Booker* will not necessarily result in increased number of trials, because pressures to dispose of high volume of cases will remain; also, plea rates have always been high even in states with indeterminate sentencing).

86. Among respondents in jurisdictions with mandatory or presumptive guidelines, eighty-two percent indicated that appeals of sentences have increased after *Blakely* and *Booker*. See *infra* app. B (question 4).

87. Attorney General Alberto Gonzales, Sentencing Guidelines Speech (June 21, 2005), available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsocrime.htm>. ("We risk a return to the pre-guidelines era, when defendants were encouraged to 'play the odds' in our criminal justice system, betting that the luck of the draw—the judge randomly assigned to the case—might result in a lighter sentence.")

88. E.g., E-mail from Joshua Marquis, Vice President, National Association of District Attorneys, to Tom Lininger, Assistant Professor, University of Oregon School of Law (Nov.

number of victims must undergo cross-examination, especially now that *Crawford* has made accusers virtually indispensable in criminal prosecutions.

Not only do the new sentencing rules increase the likelihood of trial, but they also necessitate victims' testimony on a wider range of issues. Before the Supreme Court insisted that the jury make findings of fact to support statutory sentencing enhancements, the prosecution typically submitted these issues at a sentencing hearing in which the judge was the sole fact-finder.<sup>89</sup> The defendant generally had no confrontation rights in these hearings.<sup>90</sup> The rules of evidence usually did not apply.<sup>91</sup> The standard of proof was lower than in a trial.<sup>92</sup> Often the testimony of the victim was not necessary at a sentencing hearing under the old rules, because hearsay was much easier to admit than at trial.<sup>93</sup> *Blakely* necessitates a more exacting process for proving the predicate facts in order to seek a sentencing enhancement. Basically, *Blakely* has lengthened the most difficult phase of the proceeding for accusers—the portion in which accusers must testify before the jury,<sup>94</sup> subject to all the rules of evidence<sup>95</sup> and the rigorous cross-examination allowed at trial.<sup>96</sup>

Prosecutions of domestic violence and sexual assault will definitely feel the effect of the new sentencing regime, because many states have created

21, 2005, 09:02 PST) (on file with author) (stating that *Blakely* reduces incentives for guilty pleas); M. Wood, Renewal of Sentencing Guidelines, Patriot Act Key for Prosecutors, McNulty Says (Jan. 27, 2005), [http://www.law.virginia.edu/home2002/html/news/2005\\_spr/mcnulty.htm](http://www.law.virginia.edu/home2002/html/news/2005_spr/mcnulty.htm) (reporting on speech in which Paul McNulty, U.S. Attorney for the Eastern District of Virginia, said that *Blakely* and *Booker* “will make it difficult to convince defendants to plea bargain”).

89. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1177-79 (2001) (noting that, as of 2001, judges were generally the primary fact-finders in sentencing of noncapital cases).

90. *Id.* at 1178.

91. Fed. R. Evid. 1101(d)(3) (stating that Federal Rules of Evidence do not apply at sentencing).

92. Bibas, *supra* note 89, at 1152-53 (noting that pre-*Blakely*, the standard of proof was preponderance of the evidence).

93. For example, a police officer's testimony regarding a victim's excited utterance would be a sufficient basis on which to impose a sentencing enhancement in the pre-*Crawford*, pre-*Blakely* era. See Fed. R. Evid. 803(2), 1101(d)(3).

94. Among respondents to this Article's survey, seventy-two percent believed that the sentencing procedures necessitated by *Blakely* and/or *Booker* would lengthen the testimony of accusers and victims before the jury, as compared with the period preceding June 2004. See *infra* app. B (question 8).

95. This Article's survey found that among the states establishing bifurcated jury proceedings in the wake of trial, fifty percent apply the state's evidence code to the jury proceedings regarding sentencing issues. See *infra* app. B (question 7).

96. Courts are split as to whether *Crawford* applies at sentencing hearings. See Margaret Paris, *Crawford Symposium: Introduction*, 20 Crim. Just. Mag., Summer 2005, at 5, 5 (noting ambiguity as to whether *Crawford* applies at sentencing). Compare *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005) (finding that *Crawford* does not apply to sentencing hearings), with *Desue v. State*, 908 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 2005) (stating that *Crawford* does apply to sentencing hearings). In any event, many jurisdictions are requiring submission of sentencing issues to juries during the underlying trial, and *Crawford* certainly applies in that setting. See *infra* app. B (questions 5 and 6).

special sentencing enhancements for such cases. The following factors could form the basis for an increase in the maximum sentencing range: the youth of the victim, the defendant's use of a weapon, the severity of injury caused by the defendant, the defendant's deliberate cruelty or other aggravating mental state, the pregnancy of the victim (whether preexisting or caused by the defendant), the presence of a child witness, and the defendant's recidivism.<sup>97</sup> Indeed, *Blakely* itself involved a sentencing enhancement for "deliberate cruelty" in a domestic violence case.<sup>98</sup> Were the *Blakely* case retried<sup>99</sup> in Washington State under the new procedure approved by the state's legislature in April 2005, a jury would need to hear evidence regarding the defendant's "deliberate cruelty" and any other sentencing enhancements at the same time that the jury adjudicated the defendant's guilt or innocence—requiring more testimony at trial by every witness (including the victim) whose evidence would be necessary to support the sentencing enhancements.<sup>100</sup>

In sum, *Blakely* and *Booker* require accusers to work harder at trials and sentencing hearings. Accusers will need to testify more often, and a higher

---

97. A number of recent law review articles have analyzed sentencing enhancements in domestic violence prosecutions. *E.g.*, Michelle Aulivola, *Outing Domestic Violence*, 42 *Fam. Ct. Rev.* 162, 168 (2004) (noting enhancements for recidivism); Caroline Dettmer, *Increased Sentencing for Repeat Offenses of Domestic Violence in Ohio: Will This End the Suffering?*, 73 *U. Cin. L. Rev.* 705, 706 (2004) (discussing enhanced sentences for recidivism); *see also* 18 *U.S.C.* § 2261(b)(3) (2000) (providing for enhanced sentences in interstate domestic violence cases where an assailant uses a weapon or causes severe injury); Leigh Goodman, *Achieving Batterer Accountability in the Child Protection System*, 93 *Ky. L.J.* 613, 628-29 (2005) (discussing enhancements based on the presence of children and a pattern of recidivism). Recent articles have also analyzed sentencing enhancements in rape prosecutions. *E.g.*, Patricia Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 *Ariz. L. Rev.* 131, 174-76, 183-84 (2002) (analyzing enhancements for the use of drugs to accomplish sexual assault); Carol L. Gallery & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 *J.L. Med. & Ethics* 327, 328 (2004) (discussing enhancements based on HIV exposure); Gregory A. McCarthy, *Reforming Chapter 14 of Arizona's Criminal Code: Bringing Consistency, Clarity, Contemporaneity, and Constitutionality to Sexual Offense in Arizona*, 33 *Ariz. St. L.J.* 229, 231 n.12 (2001) (discussing enhancements for extraordinary violence and recidivism); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 *DePaul J. Health Care L.* 109 (2004) (discussing sentencing enhancements based on the age of the victim); Susan Purcell, *The Evolution of Delaware Sex Crimes Legislation*, 19 *Del. Law.*, Summer 2001, at 8, 10 (reviewing sentencing enhancements based on the difference in age between the assailant and victim); Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 *Whittier L. Rev.* 821, 866 (2004) (discussing enhancements based on HIV exposure).

98. *Blakeley v. Washington*, 124 *S. Ct.* 2531, 2534-35 (2004). The defendant had kidnapped his wife and forced her into a coffin-like box before transporting her a great distance. *Id.*

99. The *Blakely* case actually did not require retrial because the defendant had entered a guilty plea. *Figure in Sentencing Case Gets 35 Years*, *Columbian* (Vancouver, WA), Mar. 25, 2005, at C2.

100. As a result of *Blakely* and Washington's new Senate Bill 5477, the factual basis for sentencing enhancements must be proven to the jury during the underlying trial, except in very narrow circumstances. Amala & Laurine, *supra* note 83, at 1140-41.

proportion of their testimony will be subject to the rules of evidence than in the era before 2004.

### B. *Erosion of Evidentiary Privileges for Accusers*

Several privileges that previously shielded accusers have become more fragile in recent years. One example is the spousal testimonial privilege. When applicable, this privilege allows a witness to refuse to testify against her spouse.<sup>101</sup> Due to the complex psychological milieu in a domestic violence case, many victims may wish to invoke this privilege when called to testify against their spouses.<sup>102</sup> Advocates of mandatory prosecution have urged that the spousal testimonial privilege should not apply in prosecutions of violence committed by one spouse against another.<sup>103</sup> This proposal met with significant resistance in the 1990s,<sup>104</sup> but eventually more and more states adopted domestic violence exceptions to the spousal testimonial privilege,<sup>105</sup> and by 2005 such exceptions were universal.<sup>106</sup> Now a victim who has suffered domestic violence or rape at the hands of her spouse may not decline to testify on the ground that she is married to the defendant.<sup>107</sup>

The privilege against self-incrimination has weakened as well. Victims of domestic violence and sexual assault sometimes wish to “take the Fifth” for a variety of reasons: They fear that their inconsistent statements over

101. Mueller & Kirkpatrick, *supra* note 13, § 5.31. In most states, the witness is the holder of the privilege. Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. Mem. L. Rev. 137, 158 (2001) (noting that a majority of states with a spousal privilege permit only the witness spouse to assert the privilege). In other words, the witness can elect to testify whether or not her spouse approves. By contrast, the marital communication privilege, which shields confidential communications between spouses during marriage, only yields when both spouses approve disclosure.

102. Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 Stan. L. Rev. 205, 221-22 (1999) (noting that victims abused by spouses would invoke the privilege if they could).

103. Renee L. Rold, *All States Should Adopt Spousal Privilege Exception Statutes*, 55 J. Mo. B. 249, 251-52 (1999) (explaining advantages and disadvantages of these statutes).

104. E.g., Anita K. Blair, *Domestic Violence: Should Victims Be Forced to Testify Against Their Will?*, A.B.A. J., May 1996, at 77.

“Mandatory waiver of spousal privilege goes too far. Advocates of mandatory waiver aren’t interested in victims’ rights; if they were, they would respect a woman’s right to invoke her privilege not to testify. . . . A married woman who wants to stay married might have many good reasons not to want to testify against her husband.”

*Id.*

105. Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 Tex. J. Women & L. 89, 97 (1997) (describing the adoption of an exception by Texas in 1995); Malinda L. Seymore, *Isn’t It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 Nw. U. L. Rev. 1032, 1054-58 (1996) (analyzing states’ different approaches to spousal testimonial immunity in prosecutions of crimes committed by one spouse against another).

106. Mosteller, *supra* note 28, at 609 n.550 (noting that by 2005, all states recognizing the spousal testimonial privilege had created an exception for cases such as domestic violence in which one spouse has committed a crime against the other).

107. *Id.*

time may subject them to prosecution for perjury;<sup>108</sup> they fear that their own violence against their assailants may amount to criminal conduct;<sup>109</sup> or they have no valid basis for the privilege and are simply seeking to avoid testifying on a particular issue.<sup>110</sup> Lately, victims find it more difficult to invoke the privilege against self-incrimination. In 2004, the Supreme Court tightened the test for determining whether statements are truly self-incriminating.<sup>111</sup> The new test requires a closer nexus between the statement and the potential criminal liability of the speaker.<sup>112</sup> Further, prosecutors are immunizing an increasing number of witnesses who would otherwise take refuge under the Fifth Amendment.<sup>113</sup> Prosecutors realize that immunizing these witnesses may be the only way to meet *Crawford*'s new confrontation requirements.<sup>114</sup> Thus the privilege against self-incrimination currently offers less solace to victims than it has in the past.

---

108. Hollis L. Webster, *Enforcement in Domestic Violence Cases*, 26 Loy. U. Chi. L.J. 663, 678 n.94 (1995) (indicating that domestic violence victims sometimes claim the Fifth Amendment privilege because they fear prosecution for changing their story).

109. John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 Mich. J. Gender & L. 207, 226 (2003) ("A victim of domestic violence may resort to violence against a batterer to protect herself and/or her children from further violence. Such actions may lead to criminal charges against the victim."); Webster, *supra* note 108, at 678 n.94 (noting that a woman who has filed a domestic violence complaint sometimes takes the Fifth by the time of trial, because she fears that her own conduct on the date of the charged offense might be prosecuted as an assault).

110. H. Morley Swingle et al., *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. Mo. B. 220, 222 (2002) (noting that some domestic violence victims refuse to testify on the ground of self-incrimination when there is simply no basis for the privilege).

111. *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004).

112. In *Hiibel*, a five-Justice majority stressed that the privilege against self-incrimination only applies where "the danger to be apprehended [is] real and appreciable." *Id.* at 188-89 (citations omitted). Citing an 1896 opinion, the *Hiibel* majority indicated that the privilege should not apply where "the answer of the witness will not directly show his infamy, but only tend to disgrace him." *Id.* (citations omitted). Four Justices dissented, and one of them, Justice Stevens, wrote separately to raise his concern that the Court's prior "cases have afforded Fifth Amendment protection to statements that are 'incriminating' in a much broader sense than the Court suggests. It has 'long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating . . .'" *Id.* at 195 (Stevens, J., dissenting) (citation omitted).

113. Jon S. Jackson, *Counsel Should Provide More Fury, Less Nothing: 2004 Developments in Professional Responsibility*, Army Law., May 2005, at 35 (referring to "the recent explosion of cases involving testimonial immunity within the context of *Crawford v. Washington*"); Mosteller, *supra* note 28, at 607 & n.539 (noting that prosecutors now have a strong incentive to immunize witnesses because *Crawford* has put a premium on live confrontation); e.g., Swingle et al., *supra* note 110, at 222 (stating that Missouri prosecutors now have statutory power to immunize witnesses, and prosecutors are using this power to immunize domestic violence victims who would otherwise take the Fifth at trial).

114. See, e.g., *United States v. Wilmore*, 381 F.3d 868, 871-73 (9th Cir. 2004) (finding a *Crawford* violation where the trial court prohibited the defense counsel from cross-examining a prosecution witness concerning her inconsistent grand jury testimony; she resisted this cross-examination by invoking her Fifth Amendment privilege against self-incrimination).

Of greater concern to victims is the privilege for psychiatric and counseling records. Especially in a prosecution for acquaintance rape, when the credibility of the accuser is crucial, a defense attorney will often attempt to obtain psychiatric and counseling records for impeachment.<sup>115</sup> Some defense attorneys may seek these records not only for legitimate purposes, but also to intimidate the accuser and discourage her from pursuing the case.<sup>116</sup> While some states have created privileges for counseling records, these privileges are riddled with exceptions based on the defendants' need for impeachment material and the notion that accusers put their mental health at issue when they file criminal complaints.<sup>117</sup> Defendants now can gain access to accusers' counseling records more easily than in the past. In fact, experts say that many prosecutors have given up fighting requests for the accusers' counseling history.<sup>118</sup> The result is devastating for victims.<sup>119</sup> During cross-examination, they must hear their most private and sensitive concerns repeated in open court. Many victims become reluctant to speak with psychiatrists and counselors at all,

---

115. Gina McClard, the Associate Director of the National Crime Victim Law Institute in Portland, Oregon, commented that "[i]f you're a rape victim, more times than not the defense will request your [counseling] records and get them." Alison Stein Wellner, *The Startling New Defense Rapists are Using*, *Glamour*, Nov. 2003, at 161 (quoting McClard); see Wendy J. Murphy, *Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 *New Eng. L. Rev.* 983, 983 (1998) ("Over the past decade, it has become increasingly common for defense counsel in criminal cases to seek access to personal, confidential, and even privileged information of victims and witnesses, including records of therapeutic counseling."); Jennifer L. Hebert, *supra* note 40, at 1453 ("[R]equests for victims' mental health records in sexual assault cases are routine practice.").

116. Hebert, *supra* note 40, at 1453. Wendy Murphy has argued that defense attorneys threaten disclosure of victims' counseling records as "a subtle form of intimidation." See Wellner, *supra* note 115, at 161.

117. Hebert, *supra* note 40, at 1468-71 (surveying states that allow disclosure of counseling records after in camera review finds them to be material to defendants' impeachment strategies); Adam Liptak, *Privacy of Rape Accusers Clashes with Trial Rights*, *N.Y. Times*, Jan. 26, 2003, at A16 (noting that state statutes creating victim-counselor privileges "often allow exceptions that make it hard for counseling centers to assure clients that their confidences will never be revealed").

118. Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 *Utah L. Rev.* 695, 698 ("Although rape victims have been promised privacy in the information they disclose to counselors, this information has become routinely disclosed to defendants."); Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 *New Eng. J. on Crim. & Civ. Confinement* 331, 332 (2005) (noting that practices of obtaining sexual assault victims' "therapeutic records has become virtually routine"); Wellner, *supra* note 115 ("[E]xperts say the practice [of requesting counseling records] has become so common that some prosecutors have given up fighting it.").

119. Wilkinson-Ryan, *supra* note 46, at 1375-76 (discussing the humiliation and prejudice caused by admission of counseling records).

or they may try to avoid testifying in order to preserve the confidentiality of their counseling records.<sup>120</sup>

Rape shield laws have faltered over the last few years as well. These laws exclude evidence of the accuser's prior "sexual behavior," subject to certain exceptions.<sup>121</sup> Recently some appellate courts have interpreted the term "sexual behavior" very restrictively, limiting the laws' effectiveness as a safeguard for accusers' privacy.<sup>122</sup> Another recent trend is the increased use of an exception in most states' rape shield laws that allows inquiry about the accuser's sexual history in order to show that another person was the source of bodily fluid or the cause of the injury at issue in the prosecution.<sup>123</sup> The development of new technologies in forensic science presents defendants with more opportunities to argue plausibly that another man could have been the source of bodily fluid found on the alleged victim. Indeed, it is quite common for a medical examination of an alleged rape victim to discover trace amounts of semen from two men with distinct DNA.<sup>124</sup> The defendant then may be able to convene a pretrial hearing in which he may interrogate the accuser about her sexual involvement with other men.<sup>125</sup> There is no guarantee that this hearing will generate any evidence admissible under the rape shield laws, but the hearing will certainly be traumatic for the accuser and invasive of her privacy.

Even the confidentiality of attorney-client communications has grown more uncertain in the last few years. Victims of domestic violence and sexual assault sometimes consult with lawyers to obtain restraining orders, to dissolve their marriages, to gain custody of their children, to apply for public benefits, to sue their assailants, or to defend against criminal charges

---

120. Hebert, *supra* note 40, at 1454-55 (noting that some victims "withdraw complaints to maintain their privacy").

121. Fed. R. Evid. 412; 6 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence T-46 to T-50 (Joseph M. McLaughlin ed., 2d ed. 1997) (Table of State and Military Adaptations of Federal Rules of Evidence) (listing state analogs of Rule 412).

122. *E.g.*, Richardson v. State, 581 S.E.2d 528, 529-30 (Ga. 2003) (reversing the lower court's application of a rape shield law to prevent disclosure of a victim's other "relationship," without particular reference to "sexual aspects"); State v. Garron, 827 A.2d 243 (N.J. 2003) (reversing a conviction because the trial court relied on a rape shield law to exclude evidence of accuser's prior flirtatious acts and speech); *see also* Lewis v. Wilkinson, 307 F.3d 413, 423 (6th Cir. 2002) (reversing the conviction because the trial court invoked a rape shield law to exclude the accuser's diary entries referring generally to other relationships). *See generally* Marah deMeule, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. Rev. 145, 160-65 (2004) (surveying recent cases). Justice Coleman, dissenting in the *Garron* case, condemned the majority's position as "retrogressive," and declared that "[t]oday's decision essentially restricts our Rape Shield Law to sexual assaults between victim and violent stranger, which translates into about fifteen percent of rapes." *Garron*, 827 A.2d at 272-73 (citations omitted).

123. 6 Weinstein, *supra* note 121.

124. Kirk Johnson, *The Bryant Trial: Anatomy of a Case That Fell Apart*, N.Y. Times, Sept. 3, 2004, at A14 (noting that the "discovery of semen from two men in a medical examination of a rape victim is quite common" if the woman had sex recently before the attack).

125. This occurred, for example, in the prosecution of Kobe Bryant. *See infra* Part II.C.



that the victims themselves may face.<sup>126</sup> The confidentiality of these attorney-client communications is increasingly at risk. In 2003 and 2004, a majority of state bars adopted revisions to their ethical codes that included important exceptions to lawyers' duties of confidentiality.<sup>127</sup> One new provision suspends the confidentiality rules when clients have diminished capacity and are at risk of harming their own interests;<sup>128</sup> conceivably, this language could apply to the posttraumatic stress experienced by battered women and rape victims. A second recent amendment allows lawyers to breach confidentiality when necessary to comply with a statute such as a "mandatory reporter" law,<sup>129</sup> so lawyers for battered women may end up producing impeachment material when they detect that their clients are perpetuating the cycle of violence. In addition, many states have adopted rules allowing lawyers to disclose a client's intent to commit a fraud or crime<sup>130</sup>—a provision that arguably applies when a client is prepared to tell a different story in court than she told a police officer. Some defense attorneys in rape cases have brazenly subpoenaed the victims' attorneys for trial testimony,<sup>131</sup> sending a signal that the victims have nowhere to hide.

Summing up the foregoing analysis, the recent erosion of evidentiary privileges compounds the trauma that accusers experience during cross-examination in prosecutions of domestic violence and sexual assault. The accusers dread their testimony more because of their greater vulnerability to impeachment, their diminished protection from self-incrimination, and their reduced privacy in their interaction with spouses, counselors, and attorneys.<sup>132</sup>

---

126. Burman, *supra* note 109, at 220-28 (listing various reasons why battered women retain lawyers).

127. For a chart showing the states' different approaches to confidentiality, see John S. Dzienkowski, Professional Responsibility Standards, Rules & Statutes 107-14 (2005).

128. Model Rules of Prof'l Conduct R. 1.14(c) (2003).

129. *Id.* R. 1.6(b)(6) (stating that lawyers may disclose confidential client information "to comply with other law or a court order"). Some state statutes designate lawyers as mandatory reporters. See Lisa Hansen, *Attorneys' Duty to Report Child Abuse*, 19 J. Am. Acad. Matrimonial L. 59, 67-73 (2003). Even in states that exempt lawyers from "mandatory reporter" laws, the confidentiality rules may not apply to evidence of severe child abuse. Rule 1.6(b)(1) of the Model Rules authorizes lawyers to make disclosures where necessary to "prevent reasonably certain death or substantial bodily harm. Model Rules of Prof'l Conduct R. 1.6(b)(1).

130. Dzienkowski, *supra* note 127, at 107-14; see also Nancy J. Moore, *Revisions, Not Revolution: Targeting Lawyer/Client Relations, Electronic Communications, Conflicts of Interest . . .*, 88 A.B.A. J., Dec. 2002, at 48, 50 (noting that the majority of state bar codes authorize disclosures by lawyers to prevent clients' commission of any crime).

131. In a pretrial filing, Kobe Bryant's lawyers listed the accuser's personal attorney as a defense witness. Charlie Brennan, *Bryant Team Had 130 Witnesses Before Criminal Case Evaporated*, Rocky Mtn. News (Denver, Colo.), Nov. 9, 2004, at 16A.

132. Anita K. Blair believes that the erosion of privilege law will discourage reporting of domestic violence. Blair, *supra* note 104, at 77 ("Welcome back to the bad old days, when victims had to fear both their abusers and the system.").

### C. *Fallout from Prosecutions of Kobe Bryant and Other Celebrities*

In the last ten years, no case has more clearly illustrated—and compounded—accusers' fear of cross-examination than the prosecution of Kobe Bryant. The primary reason for the dismissal of the charges against Bryant was the unwillingness of his accuser to face cross-examination at trial. The tribulations suffered by Bryant's accuser have discouraged other rape victims from seeking recourse through the criminal justice system. At the same time, the Bryant case alerted men throughout the country that the best defense to a charge of acquaintance rape is an aggressive campaign to discredit the accuser.

The true facts of the Bryant case may never be known, but some facts are beyond dispute. On June 30, 2003, a nineteen-year-old female hotel worker went with National Basketball Association star Kobe Bryant to his hotel room in Eagle, Colorado. Bryant had sexual intercourse with this woman. She would later claim that he raped her, and he would insist that the sex was consensual. The physical evidence confirmed that the two had sexual intercourse, but the forensic scientists could not determine conclusively whether the sex had been consensual. There were only two eyewitnesses to the encounter in the hotel room: Bryant and the accuser.<sup>133</sup>

Bryant's lawyers readied a barrage of impeachment material to use against the accuser if the case proceeded to trial. The defense attorneys announced that they would present the following evidence to undermine the accusers' credibility: testimony that she had been drinking and cavorting with friends around the time of the alleged rape; evidence that she had filed a parallel civil suit against Bryant; evidence that her mental health was frail; evidence that she had sought counseling; evidence that she had discussed her encounter with Bryant without showing signs of trauma; and evidence that she had sexual relations with at least one other man around the time of the alleged rape by Bryant.<sup>134</sup> The defense team left no doubt that its strategy would be "an aggressive attack on [the accuser's] credibility and morality."<sup>135</sup>

In pretrial hearings, U.S. District Court Judge Terry Ruckriegle ruled that the defense could admit much of this evidence at trial, including evidence of the accuser's sexual relations with other men during a seventy-two-hour

---

133. For a summary of the basic facts in the Bryant case, see Harden, *supra* note 32, at A8; Johnson, *supra* note 124, at A14.

134. The following articles discuss the impeachment material that defense counsel was prepared to use in the Bryant case: Harden, *supra* note 32; Steve Henson, *Bryant's Accuser Required to Testify*, L.A. Times, Mar. 12, 2004, at D3; Johnson, *supra* note 124; Tom Kenworthy, *Lawyers Mount a Legal Offensive in Bryant's Defense*, U.S.A. Today, Jan. 26, 2004, at 11A; T.R. Reid, *Accuser's Appearance Delayed in Bryant Case: Judge Reconsiders Ruling on Questions About Woman's Sexual and Psychological History*, Wash. Post, Mar. 2, 2004, at A3; Martha Neil, *Bryant Case Leads to Calls for Change in Rape-Shield Laws*, A.B.A. J. E-Rep., Aug. 6, 2004.

135. Reid, *supra* note 134.

period surrounding the alleged crime.<sup>136</sup> Bryant's attorney Pamela Mackey punctuated the pretrial proceedings by repeatedly naming Bryant's accuser in open court, even though a court order prevented disclosure of her identity.<sup>137</sup>

The media shone a bright spotlight on the Bryant prosecution. The mainstream media refused to disclose the accuser's name, but internet sites and one talk show host delighted in revealing her identity.<sup>138</sup> When a court clerk inadvertently e-mailed transcripts of an in camera hearing to seven newspapers,<sup>139</sup> the district court issued an order prohibiting publication of the transcripts, but the Colorado Supreme Court upheld the newspapers' right to publish this information.<sup>140</sup> The district court staff also made other inadvertent disclosures that leaked sensitive information to the media regarding the accuser's identity and history.<sup>141</sup>

Two days before jury selection was to begin, the prosecution arranged a mock trial in which the accuser would face a simulated cross-examination.<sup>142</sup> The purpose of this exercise was to prepare the accuser for the rigors of trial. A prosecutor from another county played the role of Pamela Mackey, mimicking the aggressive tone that Mackey had used in pretrial hearings. The prosecutor playing Mackey tried to be "as harsh as Mackey would have been."<sup>143</sup> This attorney asked questions based on the impeachment strategies that the defense had mapped out in pretrial filings and hearings. The interrogation lasted three hours. The accuser found this mock cross-examination to be devastating. "She was literally cut open," commented a prosecutor who was present. "The mock exam was a big turning point for her."<sup>144</sup>

In fact, this rehearsal was the cause of the demise of the Bryant prosecution. Within just a few hours after the simulated cross-examination, the accuser told her legal team that she would withdraw as a witness if

---

136. Tom Kenworthy & Patrick O'Driscoll, *Judge Dismisses Bryant Rape Case*, U.S.A. Today, Sept. 2, 2004, at A1.

137. Kenworthy, *supra* note 134. Bryant's attorney Patricia Mackey would later claim that these repeated references were inadvertent.

138. Kate Zernike, *What Privacy? Everything Else But the Name*, N.Y. Times, Aug. 3, 2003, at D4.

139. Neil, *supra* note 134.

140. *People v. Bryant*, 94 P.3d 624, 627, 644 (Colo. 2004) (overruling the trial court's attempt to protect accusers' sexual history from disclosure).

141. Amazingly, the court staff mistakenly revealed sensitive information about the accuser on a number of occasions. In September 2003, the court website posted the alleged victim's name. Further, one month after the accidental disclosure of the transcripts from the in camera hearings, court staff inadvertently posted a confidential order that revealed the accuser's name along with previously undisclosed DNA evidence. Jeffrey Matrullo, *People v. Bryant and Prior Restraint: The Unsettling of a Settled Area of Law*, 4 Conn. Pub. Int. L.J. 347, 350 n.18 (2005). Court staff revealed sealed information to the public a total of four times. Jeff Benedict & Steve Henson, *The Case Against Kobe Bryant Unraveled in a Mock Trial*, L.A. Times, Nov. 6, 2004, at A1.

142. Benedict & Henson, *supra* note 141, at A1.

143. *Id.*

144. *Id.*

Bryant would simply apologize. The accuser's personal attorney, John Clune, would later recount that his client was fully committed to participating in the prosecution up until the time of the mock examination. According to Clune, the simulated cross-examination pushed her over the edge and convinced her not to testify at trial.<sup>145</sup>

A week after the mock cross-examination, District Attorney Mark Hurlbert announced that the prosecution would dismiss the charges against Bryant. "[T]he victim has informed us after much of her own labored deliberation that she does not want to proceed with this trial. For this reason, and this reason only, I am dismissing this case."<sup>146</sup>

Whether Kobe Bryant did or did not rape the accuser in Eagle, Colorado, there can be little doubt that this case had a significant effect on women's perception of the criminal justice system. Millions of women saw Bryant's accuser endure a long ordeal only to withdraw from the criminal prosecution. Victims' advocates called the trial a huge setback, and anecdotal evidence indicated that reporting of rape declined in some areas.<sup>147</sup>

On the other hand, millions of men and defense attorneys saw that a strategy of "trying the accuser" pays big dividends in a rape prosecution. The Bryant case exposed the weakness of rape shield laws and other privileges that might have thwarted such a strategy if vigorously enforced.<sup>148</sup> Bryant's defense case gave new life to myths about accusers' mendacity and promiscuity. As one former prosecutor editorialized in the Washington Post, "[M]ost of these rape myths had gone underground, seemingly because it would have been unpopular to express them. But now, distressingly, the Kobe Bryant case has granted them all permission to resurface."<sup>149</sup>

The Bryant case is not the only recent prosecution that has demonstrated the strategic value of vilifying the accuser. The successful defenses of William Kennedy Smith,<sup>150</sup> Mark Chmura,<sup>151</sup> and Michael Jackson<sup>152</sup> all

---

145. *Id.*

146. Kenworthy & O'Driscoll, *supra* note 136.

147. For examples of areas in which the reporting of rape to law enforcement has decreased in the wake of the Bryant case, see *supra* note 32. Eagle County District Attorney Mark Hurlbert noted that "[t]his kind of thing creates a chilling effect for other victims. . . . The fear is that a rape victim would choose not to report it if they're going to be drug [sic] through the mud like this." Reid, *supra* note 134.

148. According to prominent defense attorney Laurie Levenson, the Bryant case "show[ed] the public that rape-shield laws are not absolute barriers to exposing an accuser's sexual past." Claire Luna, *Law No Shield in Rape Trials*, L.A. Times, Mar. 21, 2004, at B1.

149. Alice Vachss, Op-Ed, *The Charge of Rape, the Force of Myth*, Wash. Post, Nov. 2, 2003, at B2.

150. William Kennedy Smith is the nephew of U.S. Senator Ted Kennedy. The defense of Smith by noted attorney Roy Black is summarized in Taslitz, *supra* note 18, at 82-97. See also Gregory M. Matoseian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 *Law & Soc'y Rev.* 669 (1995).

151. Mark Chmura played football for the Green Bay Packers. Tom Kertscher, *Experts Worry Some Rape Victims May Not Speak Out Now; Chmura Verdicts, Cross-Examination Send Message*, Milwaukee J. Sentinel, Feb. 6, 2001, at 11A.

relied heavily on such tactics. Indeed, it is hard to think of a recent high-profile case in which the prosecution has overcome this strategy. The old adage is true: The best defense is a good offense.

#### D. Increasing Sentences and Their Effects on Trial Tactics

Sentences for domestic violence have grown steadily.<sup>153</sup> In 2005, a survey of state sentencing commissions found that a majority of responding jurisdictions had seen an increase in statutory sentencing ranges for batterers over the prior five years.<sup>154</sup> One reason for the increase is the proliferation of statutes that convert domestic violence from a misdemeanor to a felony under certain circumstances, such as when the victim is pregnant, the offender carries a gun, or a minor child witnesses the incident.<sup>155</sup> Another reason for the increased punishment is courts' greater appreciation for the urgency of protecting battered women and children.<sup>156</sup>

Sentences for rape have risen as well. The 2005 survey of state sentencing commissions found evidence of this trend.<sup>157</sup> In addition, data released by the U.S. Bureau of Justice Statistics show a long-term increase in the prison time served by convicted rapists. The average time served for

152. John M. Broder & Nick Madigan, *Jackson Cleared After 14-Week Child Molestation Trial*, N.Y. Times, June 14, 2005, at A1.

153. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 748 (2005) (noting a recent increase in penalties for domestic violence, among other offenses, and noting that the majority opinion in the U.S. supports this increase); see John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & Pol'y 189, 189 (2005) (noting across-the-board trend toward higher sentences in the U.S.).

154. See *infra* app. B (question 3).

155. Wayne A. Logan, *Criminal Law Sanctuaries*, 38 Harv. C.R.-C.L. L. Rev. 321, 374 n.340 (2003) ("[S]tates are increasingly authorizing or mandating significantly enhanced criminal penalties for domestic violence committed in the presence of children."); Family Violence Prevention Fund, *The Case for Violence Prevention*, <http://endabuse.org/programs/display.php3?DocID=224> (last visited Oct. 16, 2005). The Family Violence site notes that

[a]t least eleven states have enacted some form of enhanced penalty relating to criminal punishment when children are exposed to domestic violence. This is most often done by establishing separate criminal charges in addition to domestic violence charges, making exposing a child to domestic violence a felony rather than a misdemeanor, and increasing prison sentences for these perpetrators.

*Id.*; e.g., Alaska Stat. § 12.55.155(c)(18)(C) (2004); Ariz. Rev. Stat. Ann. § 13-702(c)(17) (Supp. 2005); Cal. Penal Code § 1170.76 (West 2004); Fla. Stat. Ann. §§ 921.0014, 921.0024(1)(b) (West 2001); Haw. Rev. Stat. § 706-606.4(1)(c) (2004); Idaho Code Ann. § 18-918(7)(b) (2004); Okla. Stat. Ann. tit. 21, § 644 (West Supp. 2005); Or. Rev. Stat. § 163.160(3)(c) (2003); Utah Code Ann. § 76-5-109.1 (2003); Wash. Rev. Code Ann. § 9.94A.535(3)(h)(ii) (West 2001).

156. Decades ago, courts were reluctant to impose any significant punishment on convicted batterers. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1663 n.26 (describing courts' prior unwillingness to sentence batterers to incarceration). Now courts impose substantial sentences on defendants convicted of family violence. Matthew R. Durose et al., *supra* note 16, at 50 (noting that among defendants convicted of family assault in state courts of eleven large counties, 58.9% went to local jails, and their mean sentence was almost seven months; 27.4% went to state prisons, and their mean sentence was 38.3 months).

157. See *infra* app. B (question 1).

rape in 1983 was 46.9 months (less than four years).<sup>158</sup> By the mid-1990s, convicted rapists typically served approximately sixty months (five years).<sup>159</sup> In 2002, the most recent year for which data is available, the average time served on a rape conviction was ninety months (seven and a half years).<sup>160</sup>

The foregoing data reflect state court sentencing. When one takes account of the rise in federal prosecution of violence against women, defendants' sentencing exposure for these crimes has increased considerably. Federal prosecutions have risen by over one hundred percent in recent years.<sup>161</sup> Federal sentences are significantly higher than state sentences, and there is no possibility of parole in the federal system.<sup>162</sup>

How does increased sentencing exposure affect cross-examination of accusers? It is axiomatic that cross-examination becomes more grueling when potential punishments increase. As Professor Roger Crampton has observed, "Hyper-adversarialism prevails in high-stakes cases."<sup>163</sup> Certainly a defendant who faces a misdemeanor charge of domestic violence, with virtually no possibility of incarceration, will take cross-examination of the accuser less seriously than a defendant who faces a felony charge of domestic violence. Indeed, when the federal government began prosecuting gun possession by defendants who had previous misdemeanor convictions for domestic violence, these defendants complained that they did not take their trial rights seriously in the misdemeanor cases because of the negligible consequences.<sup>164</sup> The higher the sentence, the greater the defendants' desperation—and desperate defendants ask tougher questions on cross-examination.

### E. Higher Numbers of Non-English-Speaking Victims

The percentage of U.S. residents whose primary language is not English has steadily risen. Nearly one in five U.S. residents does not speak English

---

158. Patrick A. Langan & David P. Farrington, U.S. Dep't of Justice, Crime and Justice in the United States and in England and Wales, 1981-96, No. NCJ 169284, 77 app. 1, fig.56 (1998).

159. *Id.*; see also Protection from Sexual Predators Act of 1997, H.R. 305, 105th Cong. § 2(a)(3) (1997) (declaring a congressional finding that the average time served for a state prison sentence for rape is five years).

160. Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, State Court Sentencing of Convicted Felons, 2002, No. NCJ 208910, tbl.1.5 (2005).

161. Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 531-32 (2003) (noting increased numbers of defendants charged under the Violence Against Women Act's provisions regarding gun crimes by domestic abusers); Durose et al., *supra* note 16, at 51 (reporting that 757 suspects were referred to U.S. attorneys' offices for prosecution under federal domestic violence laws from 2000 to 2002).

162. Durose et al., *supra* note 16, at 50-52 (showing that federal sentences for domestic violence offenses far exceed state sentences).

163. Robert C. Crampton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 Fordham L. Rev. 1599, 1608 (2002).

164. Lininger, *supra* note 161, at 585-93.

in the home—up almost thirty percent since the 1990s.<sup>165</sup> The 2000 Census showed that in eight states, over twenty-five percent of the population speaks a language other than English in the home.<sup>166</sup> The 2000 Census also revealed that twenty-one million U.S. residents—or nine percent of the total population—admitted some difficulty speaking English.<sup>167</sup> These figures probably underestimate the numbers of U.S. residents who have trouble with English, because the Census Bureau typically undercounts non-English speakers. All the available evidence suggests that the proportion of non-English speakers in the U.S. will grow considerably in the coming decades.<sup>168</sup>

Concomitantly with their growth as a proportion of the U.S. population, an increasing number of non-English speakers are appearing in court as accusers in prosecutions of domestic violence and sexual assault. The U.S. Bureau of Justice Statistics found that crime rates in the non-English-speaking population are approximately equal to those in the English-speaking population,<sup>169</sup> but the changes in the ratio of non-English speakers to English speakers means that a higher proportion of accusers do not speak English.

Cross-examination is more difficult for witnesses lacking facility in English. Translators may not be able to convey precisely the meaning of the attorney's question or the response by the witness,<sup>170</sup> causing friction during the examination. Witnesses other than parties generally lack translators at any time prior to their testimony, so they may be less prepared

---

165. Hyon B. Shin & Rosalind Bruno, U.S. Census Bureau, Language Use and English-Speaking Ability: 2000, Series C2KBR-29, at 2 (2003).

166. *Id.* at 5.

167. *Id.* at 4.

168. See, e.g., U.S. Census Bureau, Resident Population—Selected Characteristics, 1790 to 1999, and Projections 2000 to 2050, in *Statistical Abstract of the United States: 2000* (2001).

169. While no data set is available that focuses solely on non-English speakers, the Bureau of Justice Statistics has collected data comparing the incidence of family and intimate violence among the Hispanic and non-Hispanic populations in the U.S., and there is no significant difference on a per capita basis. Durose et al., *supra* note 16, at 10 (breaking down data into various demographic categories); Callie Marie Rennison, U.S. Dep't of Justice, Hispanic Victims of Violent Crime, 1993-2000, No. NCJ 191208, at 6 (2002) (showing rates of victimization among the Hispanic population in the U.S.). *But see* Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal Help and Policy Implications*, 7 *Geo. J. on Poverty L. & Pol'y* 245, 250 (2000) (indicating that thirty-four percent of immigrant Latinas experienced domestic violence).

170. Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 *Harv. C.R.-C.L. L. Rev.* 543, 577 n.184 (2004) (listing common problems that arise in interpretation, including omission, addition, substitution, and condensation).

for court than English speakers.<sup>171</sup> In addition, cultural differences may heighten these accusers' sense of alienation during cross-examination.<sup>172</sup>

#### F. Greater Media Coverage of Trials

The last few years have seen an increase in both the frequency and intensity of media coverage in prosecutions of sexual assault and domestic violence.<sup>173</sup> Not only in celebrity prosecutions, but also in lower-profile cases, newspapers are litigating to require that courts disclose sensitive information about accusers.<sup>174</sup> Certain echelons of the media, such as internet news sites and radio talk shows, show little compunction about publishing the accusers' identities and other sensitive information.<sup>175</sup> Even when television footage of a trial conceals the accuser's face, her identity is easy to discover through other media. Professor Susan Estrich put it bluntly: "Anonymity is, you have to go online or listen to the radio to find out a person's name as opposed to just turning on the TV."<sup>176</sup>

The relentless media coverage of rape prosecutions tends to focus on the part of the trial that is most embarrassing for the accuser: cross-examination. Who can forget the scathing cross-examination of the accuser in the rape prosecution of William Kennedy Smith? In the television footage, an opaque screen (inserted in the editing room) prevented viewers from seeing her face. Yet the accuser's frequent breakdowns and halting responses to defense attorney Roy Black's questions left no doubt about her

---

171. *Id.* at 552-57 (explaining the great need for interpreters before non-English speakers appear in court).

172. Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrant Women of Color Face in the United States*, 2 J.L. Soc'y 109, 110 (2001) (detailing the hardship faced by immigrant victims of domestic violence, including language and cultural differences that complicate their involvement in prosecutions of their assailants); John M. Greacen, *Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts*, 44 Judges' J. 24, 25 (2005) ("Some non-English speakers are completely intimidated by the court system, having come from countries with very different legal and judicial traditions.").

173. Marah deMeule, *supra* note 122, at 146 ("Advances in communications technology leave some rape complainants stripped of virtually all privacy."); Megan Reidy, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?*, 54 Cath. U. L. Rev. 297, 319-20 (2004) (analyzing the increasing media coverage of rape trials and the increasing invasion of victims' privacy).

174. *E.g.*, *People v. Bryant*, 94 P.3d 624, 627 (Colo. 2004) (overruling the trial court's attempt to protect accusers' sexual history from disclosure); *Times Publ'g Co. v. State*, 903 So. 2d 322, 325-27 (Fla. Dist. Ct. App. 2005) (overturning the lower court's refusal to grant media access to records concerning the young victim in a rape/murder case); Matrullo, *supra* note 141, at 347-48 (noting the media's zeal in challenging court orders limiting the release of information in rape trials).

175. Thomas B. Kelley, *Oh No! Here Comes Another Celebrity Rape Trial!*, *Comm. Law.*, Spring 2004, at 2 (discussing the dissemination of information about Kobe Bryant's accuser on the internet); Ellen Goodman, *Op-Ed, Rethinking the Rape Shield*, *Boston Globe*, July 31, 2003, at A15 (stating that as a result of easy access to information about accusers on the internet, on talk radio, and in supermarket tabloids, rape shield laws offer "little more protection in rough weather than a mesh raincoat").

176. Zernike, *supra* note 138.



agony during cross-examination.<sup>177</sup> Smith's accuser eventually gave up trying to protect her privacy after several newspapers revealed her name.<sup>178</sup> She described the media coverage as "inhuman" treatment.<sup>179</sup> More recently, Kobe Bryant's accuser cited fears about media coverage of her cross-examination as one of the reasons why she could not bear to participate in a trial.<sup>180</sup>

Throughout the nation, the fear of publicized cross-examination during rape prosecutions seems to be growing. In June 2005, the U.S. Bureau of Justice Statistics released survey data showing that an increasing proportion of non-complaining rape victims explained their decision not to report by citing concerns about their privacy.<sup>181</sup>

Even complainants who give confidential tips to the media may not be able to protect their privacy. A growing number of prosecutors, criminal defense attorneys, and civil attorneys are seeking to compel reporters' revelation of informants' tips.<sup>182</sup> For example, Alabama football coach Mike Price was able to overcome a reporter's shield law to learn about information provided by a woman who accused him of sexual improprieties.<sup>183</sup> Media advocates are lobbying Congress to pass new shield laws for reporters, but as of July 2005 these efforts have been unavailing.<sup>184</sup>

177. ABC News/MPI Home Video markets a fifty-minute-long videocassette with extensive excerpts from the cross-examination of William Kennedy Smith.

178. Smith's accuser gave a televised interview in 1992 after newspapers began publishing her name, and she also gave televised interviews in 2004 to express her concerns about the publicity surrounding the prosecution of Kobe Bryant. Today (NBC Television broadcast Apr. 22, 2004) (transcript available at 2004 WL 56561508).

179. She made these remarks in a speech at Stanford University on April 13, 1992. News Release, Stanford University, Bowman Lambastes Media for Invading Her Privacy (Apr. 15, 1992), available at [www.stanford.edu/dept/news/pr/92/920415Arc2287.html](http://www.stanford.edu/dept/news/pr/92/920415Arc2287.html).

180. Benedict & Henson, *supra* note 141.

181. *See supra* note 31.

182. According to Professor Geoffrey Stone at the University of Chicago Law School, these assaults on the confidentiality of reporters' sources are a relatively recent phenomenon. In the recent past, "prosecutors did not subpoena journalists because of their respect for the freedom of the press. . . . What we face today is a serious anomaly in our history and one in which Congress should address." Kirsten B. Mitchell, *Senate Panel Implored to Advance Reporters' Shield Bill*, News Media Update, July 20, 2005, <http://www.rcfp.org/news/2005/0720-con-senate.html> (quoting Professor Stone). Of course, the most conspicuous recent example is the federal government's compulsion of a New York Times reporter to name the government source that revealed Valerie Plame was an undercover Central Intelligence Agency agent. Bay Fang, *A Murky Case Takes a Bizarre Twist*, U.S. News & World Rep., July 18, 2005, at 56.

183. *Price v. Time, Inc.* 416 F.3d 1327, 1335-48 (11th Cir. 2005) (overruling the defendant's objections based on a state law shielding reporters' sources and the First Amendment of the U.S. Constitution); R. Robin McDonald, *SI Ruling Puts Pressure on Media Attorneys*, Legal Intelligencer, July 20, 2005, at 4 (noting that former University of Alabama football coach Mike Price is "just four depositions away from securing the identities of anonymous sources whose descriptions in *Sports Illustrated* of his alleged sexual escapades preceded his 2003 firing").

184. Geneva Overholser, *Shield Law for Reporters?*, Wash. Post Live Discussion, July 20, 2005, <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/07/19/DI2005071900937.html>.

One thing is certain: Accusers in prosecutions of sexual assault and domestic violence are increasingly worried that a potentially large audience could learn of the accusers' involvement in rape trials. Categories of information that were inaccessible to the public decades ago are now only a few Google clicks away.

### G. Ironic Influence of Victims' Rights Movement

The victims' rights movement has gained momentum in recent years, and has effected major legislative and constitutional changes in most states. While many of the reforms have benefited all victims, some of the new rules have actually caused hardship for victims of domestic violence and sexual assault. To understand these unintended consequences, it is necessary first to discern the disparate interests within the victims' rights movement.

The movement's primary spokespersons are relatives of children who have been murdered or kidnapped. Prominent examples include Mark Klaas in California, Betty Jane Spencer in Indiana, Bob Kouns in Oregon, and Roberta and Vince Roper in Maryland.<sup>185</sup> John Gillis, the current director of the U.S. Department of Justice's Office for Victims of Crime ("OVC"), lost his young daughter in a gang-related shooting.<sup>186</sup> These parents deserve commendation for sharing their experience with the nation, and for urging policy reforms in order to spare other families the grief that they have suffered. Yet these leaders' interests do not always align with the interests of accusers in prosecutions of domestic violence and sexual assault. The leadership of the victims' rights movement is concerned that courts do not give victims and their families enough opportunity to testify during criminal prosecutions.<sup>187</sup> The movement's leaders have little reason

---

185. For information about the Klaas family, see <http://www.klaaskids.org> (last visited Oct. 24, 2005). For information about the late Betty Jane Spencer, see the tribute posted on the Office for Victims of Crime ("OVC") website, found at <http://www.ojp.usdoj.gov/ovc/welcovc/tributes.html> (last visited Oct. 24, 2005). For information about the late Bob Kouns, the "father of victims' rights in Oregon," see the tribute to him posted on the website of Oregon Crime Victims United, <http://www.crimevictimsunited.org/news/2005/hcr11.htm> (last visited Oct. 24, 2005). I had the privilege of meeting Mr. Kouns while he was alive, and I respect him tremendously. For information about Roberta and Vince Roper, founders of the Maryland Crime Victims' Resource Center, see <http://www.mdcrimevictims.org> (last visited Oct. 24, 2005). All of these leaders lost children to violent crimes committed by strangers.

186. Director John W. Gillis discussed his background, and the tragedy involving his daughter, in a speech on April 19, 2002. The text of this speech is available on the OVC website at <http://www.ojp.usdoj.gov/ovc/publications/infores/041902.htm>.

187. Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 Psychol. Pub. Pol'y & L. 492, 508 (2004) (stating that victims' rights organizations seek reforms that give victims a greater opportunity to express their views in criminal prosecutions); Liesa L. Richter, *Evidence: Is Oklahoma Balancing the Scales of Justice by Tying the Hands of Trial Judges?: The 2002 Amendment to Section 2403 of the Oklahoma Evidence Code Mandating Admission of In-Life Victim Photographs in Homicide Cases*, 56 Okla. L. Rev. 383, 406 (2003) (stating that across the country, "victims rights groups have become increasingly concerned with the

to fear impeachment during their testimony: They generally do not have credibility problems, and they are aware that defense counsel would only alienate jurors by embarrassing the grieving parents of murdered or abducted children. The leaders of the victims' rights movement usually had no prior acquaintance with the criminals who abducted or killed their children.<sup>188</sup> For the most part, these leaders were not percipient witnesses to the crime itself, so they find themselves "on the outside looking in" during criminal prosecutions. They must advocate vociferously to secure their place on the witness roster.

By contrast, victims of domestic violence and sexual assault often face a unique set of challenges.<sup>189</sup> They are vulnerable to impeachment on highly personal matters. They frequently have a longstanding relationship with—and continued economic dependence upon—the accused. Victims of domestic violence and sexual assault may not even wish to continue with the prosecution of the defendants.<sup>190</sup> These victims are not clamoring to make their voices heard in a legal system that would otherwise ignore them: Quite to the contrary, these victims are already among the central actors in the courtroom drama. Herein lies the major difference that distinguishes the leadership of the victims' rights movement from victims of domestic violence and sexual assault. The leadership seeks more opportunities for victims to testify, while many victims of domestic violence and sexual assault are trying to hide from the spotlight.

Recent initiatives propounded by the victims' rights movement have tended to advance the former interest at the expense of the latter. In a majority of states, victims' groups have demanded the interjection of more victim testimony in criminal prosecutions.<sup>191</sup> Not only does the victims' rights movement seek more involvement by victims at trials, but also at plea hearings and sentencing hearings. This reform is not necessarily a welcome development for reticent victims of domestic violence and sexual assault.

voice of the victim in recent years"); Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 Idaho L. Rev. 157, 163 (1997) (stating that "[t]he aim of the victim's rights movement has been to give victims a 'voice' in the process").

188. Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & Pol'y 229, 243 (2005) ("Victims of violent crimes perpetrated by strangers are the most effective spokespersons for the movement.").

189. See *supra* Part I.

190. Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 Temp. L. Rev. 645, 655 n.43 (2003) (noting that the goal of the victims' rights movement to give "victim[s] a 'voice'" may be inconsistent with the interests of battered women subpoenaed to testify in prosecutions of which they disapprove).

191. See *State v. Casey*, 44 P.3d 756, 761 n.6 (Utah 2002) ("Responding to [the victims' rights] movement, many legislatures across the country enacted statutes affording victims a voice at critical stages of the criminal justice process."); O'Hara, *supra* note 188, at 241 (noting that thirty-two states have victims' rights amendments, and other states have enacted legislation to address victims' rights). For a state-by-state analysis of measures that create more junctures for victims' testimony, see <http://crime.about.com/od/victimrightsbystate/#more> (last visited Oct. 24, 2005).

*Crawford* makes cross-examination grueling at trial,<sup>192</sup> and *Blakely* has spurred legislative reforms that apply the rules of evidence in many sentencing proceedings.<sup>193</sup> There surely are some victims of domestic violence and sexual assault who wish to offer additional testimony, but a substantial number of these victims would prefer not to lengthen their time on the witness stand.<sup>194</sup>

Another reform sought by the victims' rights movement has made trial more difficult for accusers. Victims' groups in some states have prohibited pretrial depositions of victims.<sup>195</sup> The sponsors of such initiatives believe that defendants will only harass victims during depositions, and that depositions present no advantages for victims because there is no opportunity to advocate before the judge or jury. Yet *Crawford* has greatly increased the potential value of pretrial depositions to victims. In certain circumstances, a victim who has afforded the defendant an opportunity for cross-examination before trial need not appear at trial to testify. Her hearsay statements related to the subject of the pretrial cross-examination will be admissible at trial notwithstanding *Crawford*.<sup>196</sup> Experts on victims' psychology have counseled that pretrial cross-examination is preferable to cross-examination at trial, because the atmosphere is less stressful and the deponent can take breaks as needed.<sup>197</sup> While pretrial cross-examination surely cannot replace trial testimony in the majority of cases, the denial of this option to victims of domestic violence and sexual assault is lamentable.

Of course, the leaders of the victim's rights movement did not intend to cause difficulty for a subset of victims. By and large, the victims' rights movement has made important strides for all victims. Like any movement that spans diverse interests, the victims' rights movement faces a challenge in propounding reforms that serve all the needs of its broad constituency.

---

192. See *supra* Part II.A.1.

193. See *supra* Part II.A.2.

194. See *infra* app. A (question 13) (noting that ninety-one percent of respondents reported that victims of domestic violence are unlikely to cooperate with the prosecution when subpoenaed as witnesses).

195. E.g., Ariz. Const. art. 2, § 2.1; Idaho Const. art 1, § 22(8); La. Const. art. 1, § 25; Or. Const. art. 1, § 42(1)(c). Similarly, California's Proposition 115 sought to insulate victims from pretrial examination by allowing magistrates to base probable cause findings in whole or in part upon hearsay statements related by police. See Crime Victim's Justice Reform Act, Initiative Measure Proposition 115 (codified at Cal. Penal Code § 872 (West Supp. 2005)) (approved by California voters on June 5, 1990).

196. Lininger, *supra* note 28, at 784-97 (citing cases supporting the proposition that pretrial confrontation of accusers satisfies the requirements of *Crawford*); Mosteller, *supra* note 28, 610-12 (advocating greater use of pretrial hearings to provide confrontation required by *Crawford*).

197. Lindenmyer, *supra* note 28, at 4 (noting that depositions are less stressful for victims than trial testimony, and encouraging prosecutors to arrange for pretrial depositions of victims as a means of satisfying confrontation requirements); see Lininger, *supra* note 28, at 784-97 (suggesting that greater pretrial confrontation of accusers would ease their burden after *Crawford*); Mosteller, *supra* note 28, at 610-12 (advocating greater use of pretrial hearings to provide the confrontation required by *Crawford*).

The foregoing analysis should not be construed as an indictment of the victims' rights movement, but rather as a call to examine more closely the subtle distinctions between classes of victims for whom the burden of cross-examination may vary.

### III. INADEQUACY OF PRESENT PROTECTIONS FOR ACCUSERS

The preceding section has argued that victims of domestic violence and sexual assault face an increasingly difficult ordeal during cross-examination in prosecutions of their assailants. The growing pressures on these accusers test the adequacy of safeguards designed to minimize the hardship of cross-examination. As seen below, the present safeguards are inadequate to the task.

#### A. *Federal Rule of Evidence 611(a) and Its State Counterparts*

Rule 611(a) of the Federal Rules of Evidence ("FRE") provides, in pertinent part, as follows: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment."<sup>198</sup> Over forty states have incorporated a version of FRE 611(a) into their evidence codes.<sup>199</sup> At first glance, it appears that Rule 611(a) might protect accusers from scathing cross-examination in prosecutions of domestic violence and sexual assault.

Yet in reality, Rule 611(a) is unhelpful for a number of reasons. First, the rule does not include any concrete language indicating what constitutes "harassment or undue embarrassment." There is a dearth of case law applying Rule 611(a): A recent search of Westlaw found fewer than one hundred opinions in federal and state court construing the excerpt of this rule quoted above, and most of these interpretations are somewhat perfunctory. Without much guidance in the language of the rule or in judicial opinions interpreting the rule, there is little hope for consistent application. Prominent commentators have suggested that Rule 611(a) sets a very high standard for improper cross-examination.<sup>200</sup>

Another problem is that many courts have refused to apply Rule 611(a) to limit impeachment that is otherwise permissible. Where an examining attorney employs one of the established methods of impeachment—showing bias, showing poor perception or memory, showing bad character for truthfulness, showing prior inconsistent statements—the courts generally presume that Rule 611(a) is inapplicable.<sup>201</sup> Of course,

---

198. Fed. R. Evid. 611(a).

199. 6 Weinstein, *supra* note 121, at T-86 to T-89 (noting that all jurisdictions have Rule 611(a) except California, Connecticut, the District of Columbia, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York, Virginia, and the U.S. Virgin Islands).

200. Mueller & Kirkpatrick, *supra* note 13, at 571 ("Something close to intimidation may of course be necessary on cross. . . . [N]ecessarily there is an element of coercion.").

201. *Brown v. Kentucky*, No. 2003-SC-0235-MR, 2005 WL 1412379, at \*8 (Ky. June 16, 2005) (holding that there was no violation of Rule 611(a) where questioning was permissible

impeachment bearing these familiar labels may nonetheless cause significant hardship for accusers in prosecutions of domestic violence and sexual assault. If courts construe Rule 611(a) to afford no additional protection beyond the minimal safeguards in the other impeachment rules, then Rule 611(a) is superfluous indeed.

Finally, the courts seem reluctant to apply Rule 611(a) absent strong evidence of embarrassment. Some courts await outward manifestation of trauma, such as crying.<sup>202</sup> Of course, if the witness has already begun sobbing in court, the invocation of Rule 611(a) comes a little late. Courts are unlikely to apply Rule 611(a) in advance of a traumatic episode except in situations when the accuser is a child.

Rule 611(a), in reality, does little more than memorialize the trial judge's inherent authority to supervise the courtroom. Battered women and rape victims who seek concrete protection in Rule 611(a) are in for a disappointment.

### B. *FRE 613(b) and Its State Counterparts*

FRE Rule 613(b) provides as follows: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require."<sup>203</sup> A majority of states have included virtually identical language in their evidence codes.<sup>204</sup>

The limitations of Rule 613(b) are readily apparent. The rule only applies to impeachment with extrinsic evidence of an inconsistent statement (e.g., a transcript or recording). The rule does not apply to extrinsic evidence offered to show bias or bad character for truthfulness. If the explanation of a witness is important after impeachment with prior inconsistent statements, why isn't the witness's explanation just as important after an allegation of ulterior motives or an allegation of prior misconduct? One final concern is that the rule only applies to trials, not pretrial hearings or sentencing hearings.

Even if Rule 613(b) were applied more broadly, its utility would be questionable. The opportunity to explain or deny damning prior statements does not ameliorate the difficulty of cross-examination. This right does not head off improper questions before they are asked. This right does not

---

under the impeachment rules); *Julian v. Creekside Health Ctr.*, No. 03MA21, 2004 WL 1376214, at \*8 (Ohio Ct. App. Jun. 17, 2004) (finding Rule 611(a) inapplicable where the purpose of questioning the witness "was not to cause him embarrassment; rather it was for the purpose of impeachment"); *State v. Perolis*, 398 S.E.2d 512, 517 (W. Va. 1990) (stating that "no witness should be protected from the embarrassment of proper impeachment").

202. *E.g.*, *State v. Just*, 685 P.2d 1353, 1362 (Ariz. 1983) (finding no violation of Rule 611(a) where the witness did not manifest significant outward signs of stress; the mere potential for such trauma was not sufficient for a protective order under Rule 611(a)).

203. Fed. R. Evid. 613(b).

204. 6 Weinstein, *supra* note 121, at T-90 to T-94.

protect the privacy of the witness. In fact, because most accusers go to court without their own separate counsel, it is dubious that the accuser will even recognize her right to explain or deny a prior inconsistent statement pursuant to Rule 613(b). The opponent of the cross-examination (generally the prosecutor) may not have much interest in prolonging cross-examination by asking the accuser to explain or deny the inconsistencies.

### C. *Ethical Rules Against Harassment of Witnesses*

Several ethics rules and standards address the lawyer's duties vis-à-vis third-party witnesses. Rule 4.4(a) of the American Bar Association ("ABA") Model Rules of Professional Conduct provides as follows: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."<sup>205</sup> Subpart 5 of the Preamble to the Model Rules states that a lawyer "should use the law's procedures only for legitimate purposes and not to harass or intimidate others."<sup>206</sup> The ABA Standards Relating to the Administration of Criminal Justice, a set of specialized standards for prosecutors and defense attorneys, provides that "[t]he interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily."<sup>207</sup>

These various ethical rules are largely ineffectual in policing lawyers' mistreatment of witnesses during cross-examination. To begin with, proof of a violation requires some means of determining the purpose of the examining attorney. Under all of the above-listed rules, harsh questioning is permissible unless its sole purpose is to traumatize the witness. Few lawyers would admit such motivation, and the long time period between the lawyers' misconduct and the bar disciplinary proceedings would permit ample opportunity to come up with an acceptable explanation.

Second, the state bars' enforcement of ethical rules regarding cross-examination has been notoriously lax. The number of published opinions in which bar disciplinary panels have sanctioned attorneys for violating Rule 4.4(a) is miniscule. The other above-cited rules are not mandatory: They are hortatory standards that lawyers can choose to ignore with impunity.

Third, and perhaps most important, these ethical standards seem to be at odds with the time-honored mantra that lawyers should advocate

---

205. Dzienkowski, *supra* note 127, at 72. As of June 2005, forty-four states have adopted some version of this rule.

206. *Id.* at 5.

207. Standards Relating to the Admin. of Criminal Justice Standard 3-5.7(a) (The Prosecution Function), *reprinted in* Dzeinkowski, *supra* note 127, at 924; Standards Relating to the Admin. of Criminal Justice Standard 4-7.6(a) (The Defense Function), *reprinted in* Dzeinkowski, *supra* note 127, at 935.

zealously.<sup>208</sup> In rape cases, some lawyers engage in conduct they know to be abusive of accusers because they feel their duty of zealous advocacy requires it.<sup>209</sup> A few ethics scholars have urged restraint by defense lawyers examining accusers in rape cases,<sup>210</sup> but this perspective remains a minority view.

#### D. Rape Shield Laws

Three decades ago, advocates for rape victims realized that cross-examination about the accusers' sexual history had become so harrowing that many victims simply declined to report rapes to the police. Congress and most state legislatures passed "rape shield laws" prohibiting the introduction of evidence concerning the accusers' sexual history except in certain limited circumstances. FRE 412 and its state equivalents recognize the following permissible purposes for introducing the accuser's prior sexual conduct: (1) to show prior consensual sex between the accuser and the defendant; (2) to show that someone other than the defendant was the source of the bodily fluid and cause of the injury at issue in the prosecution; and (3) to introduce any evidence that the defendant has a constitutional right to introduce.<sup>211</sup>

FRE 412's shortcomings are evident on its face. The exception allowing use of evidence concerning the accusers' prior consensual sex with the accused seems based on the premise that women forfeit their right to say "no" after voluntarily commencing a sexual relationship. Data collected from eighteen states and the District of Columbia show that the incidence of sex offenses committed in a boyfriend/girlfriend relationship is nearly as high as the incidence of sex offenses committed by strangers.<sup>212</sup> When courts limit rape shield laws to cases involving strangers, these laws become worthless in eighty-five percent of all rape prosecutions.<sup>213</sup>

---

208. Dershowitz, *supra* note 5, at 145 (defense lawyers are ethically bound to use even distasteful tactics if they can thereby advance clients' interests); Freedman, *supra* note 5, at 1727 (extolling zealous advocacy by lawyers); Smith, *supra* note 5, at 930-34, 954 (defending zealous cross-examination by defense attorney in hate crimes prosecution).

209. Beneke, *supra* note 42, at 104-05 (noting that a defense lawyer resorts to sexist arguments in a rape case because by failing to do so, he would forego a potentially winning strategy); see Smith, *supra* note 5, at 954 ("There is nothing unethical about using . . . sexual stereotypes in criminal defense. It is simply an aspect of zealous advocacy.")

210. David Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum. L. Rev. 1004, 1026 (1990) (disavowing harsh cross-examination of rape victims).

211. 6 Weinstein, *supra* note 121, at T-86 to T-89 (noting that a majority of states have a version of FRE 412).

212. Matthew R. Durose, U.S. Dep't of Justice, Family Violence Statistics, Including Statistics on Strangers and Acquaintances, No. NCJ 207846, at 29 (2005) (indicating that in 2000, the perpetrators of 2438 sex offenses were the boyfriends or girlfriends of the victims, while the perpetrators of 3053 sex offenses were strangers).

213. State v. Garron, 827 A.2d 243, 272-73 (N.J. 2003) (Coleman, J., dissenting) (stating that "[t]oday's decision essentially restricts our Rape Shield Law to sexual assaults between victim and violent stranger, which translates into about fifteen percent of rapes").



Another exception in the rape shield law—allowing admission of prior sexual history to support the inference that another man was the cause of the injury or the source of the semen found on the victim—invites gamesmanship by the defense. A high proportion of rape examinations find that the victim's body or clothing bears some residual biological evidence of recent sex with a man other than the accused.<sup>214</sup> Of course, this evidence says less about the declining morality of women than it does about the advances in forensic science. A defendant who learns that the accuser had another sex partner near the time of the alleged rape will try to circumvent the rape shield law by suggesting that the consensual partner was the source of the semen or injury at issue in the rape prosecution. Such arguments have a strong potential to embarrass the victim and inflame the prejudice of the jury in the very manner that the original authors of the rape shield laws sought to prevent. The probative value of “other source” evidence is slight, because a woman who recently had consensual sex is no less entitled to protection from an unwanted partner.

The final exception in the rape shield laws is, at first glance, simply superfluous. This exception states the rape shield law will not bar the admission of evidence that the defendant has a constitutional right to present. The point goes without saying: A statute cannot trump the Constitution.<sup>215</sup> Yet the inclusion of this truism in the rape shield law is not simply harmless. It suggests that the rape shield law poses a greater potential to offend the Constitution than do other rules of evidence. Very few other rules memorialize their constitutional boundaries.<sup>216</sup> The juxtaposition of Rule 412 with these other rules leaves judges with the impression that they must approach the rape shield provisions with special caution.<sup>217</sup>

Many defendants in rape prosecutions have overcome shield laws by arguing that their proffered evidence does not directly indicate “sexual” conduct by the defense. So, for example, defendants have been able to introduce a diary entry in which an accuser indicated “I can't say no,” a third party's testimony that the accuser behaved in a “flirtatious” manner, and evidence of prior “relationships” without any explicit mention of sex.<sup>218</sup> This evidence refers obliquely to sexual conduct, and therefore

---

214. Johnson, *supra* note 124 (stating that “[d]iscovery of semen from two men in a medical examination of a rape victim is quite common” if the woman had sex recently before the attack).

215. For example, no state has ever memorialized *Bruton v. Ashcroft*, 537 U.S. 1210 (2003), in its version of Rule 801(d)(2), even though the number of *Bruton* violations far exceeds the number of cases in which the rape shield laws violate the defendants' rights.

216. Some states did not even adopt this third exception, because the primacy of constitutional law is so obvious. 6 Weinstein, *supra* note 121, at T-86 to T-89 (listing state analogs of Rule 412).

217. *Lewis v. Wilkinson*, 307 F.3d 413, 422 (6th Cir. 2002) (citing constitutional concerns as the rationale for disregarding Ohio's rape shield statute, even though “to permit cross-examination on these statements could lead to a trial of the victim's sexual history with other men”).

218. See *supra* note 122.

implicates the core purposes of the rape shield law. If courts permit defining the term “sexual” narrowly, the defense will be able to overcome the rape shield law merely by offering circumstantial or indirect evidence of sexual conduct by the accuser.

Procedural constraints also limit the value of rape shield laws to the accuser. Without her own attorney, the accuser is not in a strong position to enforce the law. The prosecutor is rarely a diligent guardian of accusers’ privacy rights. In fact, prosecutors may prefer not to object because they do not wish to create the impression that they are “hiding something” from the jury. Very few jurisdictions permit interlocutory review of rulings under the rape shield law, and the government is unlikely to win an appeal based on intrusive questioning of the victim. Thus, trial judges have little accountability for neglecting to enforce the rape shield laws.

### E. “Support Persons” in the Courtroom

Some states have enacted rules that permit “support persons” to accompany victims as they testify at trial. For example, California Penal Code section 868.5 allows one support person to stand or sit by the witness’s side when she takes the stand. The judge must “admonish the support person or persons to not prompt, sway, or influence the witness in any way.”<sup>219</sup> If the presence of the support person interferes in any way with the testimony of the witness, the judge may remove the support person from court.<sup>220</sup> A total of thirteen other states have enacted similar provisions.<sup>221</sup>

219. Cal. Penal Code § 868.5 (West 2005).

220. *Id.*

221. Colo. Rev. Stat. § 16-10-401 (2004) (allowing a “victim’s advocate”—defined as “any person whose regular or volunteer duties include the support of an alleged victim of physical or sexual abuse or assault”—to remain at trial even if the general public is sequestered); 725 Ill. Comp. Stat. Ann. 120/4(9) (West 2002) (giving all victims of crime “[t]he right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim’s choice”); Mich. Comp. Laws Ann. § 600.2163a(4) (West 2000) (providing that a victim of sexual assault or child abuse “who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony”); Minn. Stat. § 631.046 (2003) (allowing victims of sexual assault or child abuse to bring a “parent, guardian, or other supportive person” to be present “at the omnibus hearing or at the trial”); N.Y. Crim. P. Law § 190.25(3)(h) (McKinney 2005) (providing that victims who are twelve years old or younger may be accompanied by a “social worker, rape crisis counselor, psychologist or other professional”); Okla. Stat. Ann. tit., § 60.4(K) (West 2003) (allowing a support person to accompany a domestic victim but not to make legal arguments); S.C. Code Ann. § 59-105-40 (2004) (providing that support persons may join victims during testimony during disciplinary proceedings at “institutions of higher learning”); S.D. Codified Laws § 22-1-11 (2004) (providing that a “victim or witness assistant” may accompany a victim to court); Va. Code Ann. § 19.2-265.01 (West 2004) (allowing a parent or guardian of a minor victim, or any other adult chosen by the victim, to be present at trial); Wash. Rev. Code § 7.69.030(10) (2005) (providing that the victim of a violent or sex crime may have “a crime victim advocate from a crime victim/witness program, or any other support person of the victim’s choosing, present at . . . judicial proceedings related to criminal acts committed against the victim”); Wyo. Stat. Ann. § 7-11-408(b) (2005) (allowing a support person to be present

The support person assists the victim in a number of ways. At a minimum, the presence of the support person assures the victim that she is not alone. The support person is a familiar, soothing sight. During especially difficult portions of the trial, the victim can regain her composure by focusing on the support person. In addition, the defendant may be less likely to glower at the accuser when a support person is sitting nearby in a tight phalanx.

But the value of the support person should not be overstated. The support person has no power to parry an improper question by an attorney.<sup>222</sup> The support person usually cannot advocate on behalf of the witness in pretrial hearings. The judge, who may regard the support person as an interloper or a distraction,<sup>223</sup> is unlikely to solicit this person's input on any matter during the trial. In fact, it is unlikely that the transcript of a trial in which a support person accompanied the victim would look any different from the transcript of a trial lacking a support person.

Indeed, in some ways, the presence of a mute companion may just accentuate the passivity and helplessness of a victim/accuser. Whereas the defendant and the prosecution bring powerful advocates to the courtroom, the victim has only a silent partner. The attorneys for the prosecution and defense merit the judge's attention, but the judge has little interaction with the victim's companion. The jury pays heed to counsels' arguments and questions, but the jury soon tires of the support person's unspeaking role. Without belittling the complex psychological needs of the victim, there is a marked disparity between a lawyer's representation and a layperson's companionship. The inefficacy of the support person underscores the powerlessness of the victim herself.

#### IV. TOWARD A NEW CONCEPTION OF CROSS-EXAMINATION

In order to craft a set of reforms that accords adequate protection to accusers in prosecutions of domestic violence and sexual assault, it is first necessary to reconceptualize cross-examination. Two paradigmatic shifts are necessary. First, the bilateral model of advocacy in criminal trials must give way to a more nuanced trilateral model. Second, the teleological

---

with a child victim of incest or sexual assault during a videotaped deposition); Ariz. R. Crim. P. 39(b)(9) (giving the victim the "right to name an appropriate support person, including a victim's caseworker, to accompany the victim at any interview, deposition, or court proceeding, except where such support person's testimony is required in the case"); *see also* State v. Dunbar, 566 A.2d 970, 973 (Vt. 1989) (allowing for a victim of child molestation to testify with two support persons present).

222. Cf. Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 488 (2003) (stating that "effective advocacy requires more than mere accompaniment into the courtroom").

223. In *Commonwealth v. Harris*, the Supreme Judicial Court of Massachusetts expressed consternation that a victim's advocate held the hand of the decedent's mother during a murder trial, but that court concluded that there was no reversible error. 567 N.E.2d 899, 905 (Mass. 1991).

conception of victims' testimony must yield to a Kantian deontological perspective that respects individual moral autonomy for its own sake. These two arguments will be presented in turn below.

*A. A Different Paradigm: The Trilateral Adversarial Process*

The bilateral model of adversarial conflict pervades the United States' criminal justice system. Our legal culture clings to the notion that there are only two sides to legal disputes, including criminal prosecutions. The prosecution brings criminal charges to right wrongs done to society as a whole. The defendant tries to vindicate his innocence. All other interests in the courtroom ally themselves with one side or the other in the bipolar conflict.

The conception of a bilateral adversarial process has significant implications for our criminal justice system. For example, only the prosecution or the defense has standing to assert a claim, negotiate disposition of the case, or file an appeal. Evidence law also tracks the bilateral framework. Only parties may offer evidence. Only parties may object to the introduction of evidence. The admissions doctrine is only available when the government seeks to offer a statement by the defendant, not when the defendant seeks to offer a statement by the victim (a nonparty). "Prejudice" is measured vis-à-vis the interests of parties. The bilateral adversarial system, in effect, relegates accusers to the sidelines.

The inadequacy of the bipolar model is evident in several categories of prosecutions, but none provides a starker example than the prosecution of domestic violence and sexual assault. In these cases, prosecutorial interests diverge from the victims' interests to such a degree that they are closer to being adversarial than coextensive. The disjunction between prosecutors' objectives and victims' objectives are most apparent in three contexts: (1) prosecutors' unwillingness to protect victims' privacy, (2) prosecutors' impeachment of victims, and (3) prosecutors' and victims' different standards for measuring the success of a criminal case.

To begin with, prosecutors do not share victims' sense of urgency in protecting against disclosure of sensitive personal information. Prosecutors are generally very cautious about making evidentiary objections. They fear objections will signal to jurors that the government has something to hide.<sup>224</sup> Another reason why prosecutors may forego valid objections is that by giving defense counsel wide leeway, prosecutors eliminate possible appellate grounds. Prosecutors have an ethical and constitutional obligation to disclose material that undermines the credibility of the prosecution's

---

224. Prosecutor Paul Schechtman offered this perspective at a conference on the campus of New York University: "My general rule as a prosecutor is not to object often because otherwise it looks like you're hiding something." Schechtman conceded that his approach "may not be in the victim's interest." Paul Schechtman, *Comments on Professor Yaroshefsky's Paper*, 1989 Ann. Surv. Am. L. 157, 162 (1990); see also Taslitz, *supra* note 18, at 98 (noting that "[t]oo many objections will, of course, annoy the jury.").

witnesses.<sup>225</sup> Cynical prosecutors may believe that defense harassment of accusers is helpful because it may outrage the jury and increase the likelihood of conviction. Victims, on the other hand, have no ethical obligation to be forthright about their foibles, and they have a much stronger interest in privacy.

There is a second reason why the bilateral adversarial model inaccurately describes the relationship between prosecutors and victims: The government frequently impeaches accusers. FRE 607 and its state counterparts allow impeachment of a witness by the party who called the witness. The convergence of “no drop” policies and stricter confrontation requirements make such impeachment far more likely than in the past. Some evidence suggests that the government’s most effective response to *Crawford* has been to increase reliance on Rule 801(d)(1)(A), which allows impeachment of accusers with their prior inconsistent statements.<sup>226</sup> As observed by one seasoned veteran of domestic violence prosecutions, “Whoever calls the complainant loses.”<sup>227</sup>

One final reason for the discordant relationship between the prosecutor and the accuser is the different standard by which the two groups measure the success of a prosecution. Prosecutors have a short-term perspective. They focus on the jury verdict and the length of the sentence. A guilty verdict and a long sentence mean that the prosecution has prevailed; an acquittal or a short sentence brings disappointment. Prosecutors have other ancillary concerns such as managing huge caseloads and maintaining good relationships with repeat players in criminal court, but their primary concern is the “scorecard” of convictions and jail time. The accuser, for her part, has a far different gauge for measuring the success of a prosecution. A prosecution is successful for the accuser if it facilitates her long-term emotional recovery, strengthens her sense of self-determination, and leaves open the possibility of rebuilding interpersonal relationships (perhaps even with the defendant). In addition, the victim hopes that the prosecution will improve—or at least not limit—the odds of success in parallel civil litigation;<sup>228</sup> prosecutors are subject to ethical rules that prohibit them from taking actions to assist civil proceedings, and prosecutors typically regard

---

225. The Supreme Court’s ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), requires that the prosecution must disclose all exculpatory information to the defense, including information that weakens the accuser’s credibility. ABA Model Rule 3.8 and its state analogs impose on prosecutors an ethical duty similar to *Brady*’s requirements.

226. Tom Lininger, *supra* note 28, at 805 (noting that jurisdictions that relied the most heavily on Rule 801(d)(1)(A) had the fewest dismissals after *Crawford*).

227. Michelle Maxian, N.Y. City Legal Aid Soc’y, Comments at the Brooklyn Law Review Symposium: *Crawford v. Washington*: The Future of the Confrontation Clause in Light of its Past (Feb. 18, 2005) (transcript on file with author).

228. Accusers pursue parallel civil litigation to recover monetary damages, apply for restraining orders, file for a divorce, and/or obtain custody of their children, among other purposes.

parallel civil litigation as a nuisance that hinders the attainment of prosecutorial goals.<sup>229</sup>

Given the recurring conflict of interest between prosecutors and defense attorneys, a model that posits their unflagging camaraderie has outlived its usefulness. A better model would conceive of a trilateral struggle in criminal trials. The prosecution, the defense, and the victim all vie against one another, occasionally forming alliances, occasionally standing apart. By disabusing legislatures, courts, and litigants of the fallacious notion that prosecutors and victims always have identical interests, a trilateral adversarial model will clear the way for reforms that will accord victims the fair treatment they deserve.

Simply put, there are more interests in the courtroom than those that fall under the taxonomy of "prosecution" or "defense." The two-legged stool that is our present criminal justice system requires a third leg to prevent it from crashing to the ground.

### B. *Deontological Deconstruction of the Victims' Rights Movement*

Why hasn't the victims' rights movement embraced the trilateral model and pushed for reforms that would mitigate the hardship of cross-examination? One reason is that some leaders of the victims' rights movement<sup>230</sup> have conceived of victims' testimony as an instrument to further prosecutors' goals. Because prosecutors undervalue victims' privacy and wish to preserve their own option to impeach victims, they steer the victims' rights movement away from a divisive agenda that would ameliorate the hardship of cross-examination. Instead, the victims' rights movement frequently addresses other legislative priorities on which prosecutors and victims can agree: longer sentences and fewer procedural protections for defendants.

It is important to understand the interdependence of prosecutors and the high-profile relatives of crime victims who serve as spokespeople for the victims' rights movement. The spokespeople have compelling personal stories, and they can muster a popular majority in favor of reforms. On the other hand, prosecutors have the technical expertise that legislators respect. The result is an expedient symbiosis: The lay spokespeople give the movement its political appeal, and the prosecutors do much of the important

---

229. Gregory Sarno, *Annotation, Initiating, or Threatening to Initiate, Criminal Prosecution as Ground for Disciplining Counsel*, 42 A.L.R.4th 1000, §1 (2005); see Milton Pollack, *Annotation, Parallel Civil & Criminal Proceedings*, 129 F.R.D. 201, 208-12 (1990) (listing cases in which the government has sought to stay parallel civil proceedings in order to avoid prejudice against the prosecution).

230. It is important to note here that the victims' rights movement is not a monolithic movement. The movement includes some sophisticated advocates such as Douglas Beloof at the National Victims Rights Law Center and Professor Erin Ann O'Hara at the Vanderbilt University Law School, who have a subtle understanding of the predicament faced by accusers in prosecutions of domestic violence and sexual assault. The analysis that follows applies to some, but certainly not all, of the advocates in the victims' rights movement.

“behind the scenes” work. The relationship is akin to the partnership between “Baptists and bootleggers” in the prohibition era.<sup>231</sup>

One consequence of crime victims’ dependence on prosecutors to further the legislative agenda is the inability of either partner to effect reforms without the approval of the other. So, for example, prosecutors are unable to pass legislation that would make plea bargaining easier, because crime victims oppose this reform. Crime victims are unable to pass legislation that would strengthen their privacy because prosecutors oppose such a change.<sup>232</sup>

Prosecutors and victims do concur on the need for stricter sentences, reduced procedural “technicalities” that favor defendants, and presentation of “victim impact statements” that drive up sentences. The talisman of “victims’ rights” is sometimes invoked to promote measures that bear little relation to the rights of victims, unless those “rights” are nothing more than the right to aggressive prosecution. For example, in Oregon, “victims’ rights” became the primary marketing theme for ballot measures that sought, inter alia, to permit nonunanimous jury verdicts in certain cases, to change the procedures for prosecutorial immunization of witnesses, and to prevent convicts from serving on juries.<sup>233</sup>

In many respects, the present victims’ rights movement exemplifies the triumph of teleology over deontology. Victims’ testimony is a means to the end of prosecutorial victory. Some spokespeople for the victims’ rights movement accord too little emphasis to the intrinsic importance of victims themselves. Kant counsels that the individual cannot be an instrument to another end. Every person—especially a crime victim—has moral autonomy. A duty-based philosophy of law would improve prosecutors’ treatment of victims rather than subordinating victims’ interests for the utilitarian purpose of maximizing convictions. Victims’ exercise of self-determination is an important objective for its own sake, and it also improves the likelihood that victims will leave abusive relationships and avoid future victimization.

---

231. Erin O’Hara, a strong advocate for victims’ rights, made this analogy in her article, *Victim Participation in the Political Process*, 13 J.L. & Pol’y 229, 242 (2005) (citing Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, Regulation, May-June 1983).

232. E-mail from Sybil Hebb, Director of Legislative Advocacy, Oregon Law Center, to Tom Lininger, Assistant Professor, University of Oregon School of Law (Mar. 21, 2005, 17:32 PST) (on file with author) (indicating that prosecutors’ resistance was a significant reason why the Oregon Legislature did not strengthen the victim-counselor privilege in 2005).

233. These measures were part of a package (Ballot Measures 69 through 75) presented to Oregon voters through the initiative process in 1999. For more information about the measures, see the website for Oregon Crime Victims United, <http://www.crimevictimsunited.org> (last visited Nov. 21, 2005). I do not necessarily argue that all of these proposals lacked merit. As a former prosecutor myself, and as one who respects the leaders of Oregon Crime Victims United, I understand the policy reasons for some of the proposed reforms. I believe, however, that the rubric of victims’ rights is not the best label for such proposals.

## V. PROPOSED REFORMS TO AMELIORATE HARDSHIP OF CROSS-EXAMINATION

In 2005, the crisis of victims' waning confidence in the criminal justice system evokes memories of another transformative moment in the evolution of criminal procedure. In the 1970s, rape victims lost faith in the justice system because defendants could impeach them with highly sensitive and prejudicial allegations concerning the accusers' sexual history. Amidst concerns about declining rates of reporting, a broad alliance coalesced to support a set of reforms that included the original rape shield laws. Now, as in the 1970s, the plight of battered women and rape victims has grown so abject as to provide the impetus for another significant advance in criminal procedure and evidence law. Listed below are ten proposals that would adapt courtroom procedure to acknowledge, and facilitate, a trilateral adversarial process.

### A. *Legal Representation for Accusers*

Neither the Federal Rules of Criminal Procedure nor any of their state counterparts explicitly authorize an accuser to bring counsel to a criminal trial. It is extremely rare for accusers to retain counsel, and in the few cases when accusers are represented, their attorneys generally lack standing to object during cross-examination or to make arguments at pretrial evidentiary hearings.<sup>234</sup> Victims must depend on prosecutors to object when defense counsel's cross-examination violates the rules of evidence. As noted previously, prosecutors are fickle allies for victims, because prosecutors are wary of objections, and they themselves may wish to impeach the victims at some point.

Separate representation by counsel offers the best means of protecting accusers from abusive questioning in cross-examination. The rules of evidence should allow accusers to retain their own counsel, and should give the accuser's attorney standing to object to any party's questioning. The accuser's attorney should be able to attend any hearing on evidentiary issues relating to the accuser. Further, the accuser's attorney should be able to pursue interlocutory review. Where necessary, the accuser's attorney should have an interpreter, and the interpreter should be available well in advance of trial so that non-English-speaking victims can prepare adequately for their trial testimony. The law should set some clear boundaries: Accusers' attorneys may not make opening or closing statements, may not examine witnesses, may not offer any evidence, and may not make any arguments concerning sentencing. The attorney's sole purpose would be to protect the accuser from improper cross-examination.

---

234. Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 Suffolk U. L. Rev. 291, 292-94 (2005) (discussing lack of standing); see Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. U. L. Rev. 21, 59 (1992) (“The system is not equipped to nurture victims or their representatives.”).



Who would pay for accusers' counsel? Public funding should be available just as in the case of appointing counsel for indigent defendants. Given the scarcity of public funding available for indigent defense,<sup>235</sup> state legislatures should consider new strategies to raise money for accusers' counsel. Applications for victim assistance grants under the Violence Against Women Act might present one means of subsidizing counsel for accusers.<sup>236</sup> State legislatures should pass new laws fining attorneys for unethical conduct—particularly misconduct that harms accusers—and the revenue from these fines should be devoted to paying for accusers' counsel.<sup>237</sup> Perhaps state bars could once again revise their anemic pro bono guidelines to channel more volunteer hours to the representation of accusers in criminal prosecutions.<sup>238</sup> A more ambitious alternative would be to create incentives for law students or recent law graduates to represent accusers—perhaps in lieu of a sixth semester in law school, or as an alternative to taking the bar exam.

Separate counsel for accusers would bring several advantages. The courtroom environment would be more civil. Accusers would feel less pressure on the stand. Counsel could recognize possible bases for objections that accusers or prosecutors would not think (or choose) to raise. The accuser's counsel could help "translate" the accuser's concerns into objections that are cognizable in the legal system. Conversely, the accuser's counsel could impress upon her the importance of following the judge's instructions and the rules of evidence. Counsel could help the accuser prepare for trial, so that she is better able to respond to foreseeable questions by the defense or the prosecution. The likely result would be that accusers become more confident, more forthright, and less evasive on the stand. The accuser's counsel could help the accuser with ancillary matters such as applying for a restraining order, obtaining victim assistance, filing for a divorce, seeking custody of children, or seeking civil damages in a tort suit. The experience of several European countries demonstrates that separate counsel for accusers can make a real difference in securing remedies and emboldening the accuser to testify.<sup>239</sup>

---

235. David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 Va. L. Rev. 1229, 1281 (2002) (describing "[t]he drastic underfunding of indigent defense systems").

236. The Violence Against Women Act ("VAWA"), reauthorized on several occasions, has appropriated millions of dollars for state and local programs to assist victims of domestic violence. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1848 (2002).

237. See generally Stephen G. Bené, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 Stan. L. Rev. 907 (1991).

238. In most states' bar codes, Rule 6.1 calls on lawyers to provide fifty hours of pro bono service per year, primarily to indigent clients. Rule 6.1 is completely precatory, and state bars do not enforce compliance. Nationwide, the average pro bono service for the profession is less than one half hour a week. Deborah Rhode & David Luban, *Legal Ethics* 763 (3d ed. 2001).

239. William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 Stan. J. Int'l L. 37, 54-63, 55 n.79

One of the most important benefits of separate counsel for accusers is that prosecutors may focus entirely on the interests of the state, rather than worrying about the need to protect the accuser's interests. The American criminal justice system would finally provide what the ethical rules have demanded for decades: separate representation for all conflicting interests.<sup>240</sup>

### B. *Prohibition of Impeachment by Reference to Parallel Civil Suits*

The rules of evidence should be amended to include a new provision barring impeachment of an accuser on the ground that she is simultaneously litigating a tort claim arising from the same facts at issue in the criminal prosecution. This new rule might fit well in a revised version of Rule 610,<sup>241</sup> or perhaps in one of the policy exclusions in Rules 407-412.<sup>242</sup>

Presently defendants have little difficulty impeaching accusers with evidence of parallel civil claims.<sup>243</sup> The defendants argue that the accusers' interest in civil litigation makes them biased in the criminal prosecutions.<sup>244</sup> Such impeachment is virtually inevitable in a prosecution of a celebrity,<sup>245</sup> but it also occurs in lower-profile prosecutions.<sup>246</sup>

There are three reasons why a ban on such impeachment would be good public policy. First, the pendency of parallel civil litigation has scant

(1996) (discussing German and Italian procedures allowing victims' attorneys to take part in prosecutions).

240. Most states' bar codes include Rule 1.7(a), which prohibits a lawyer from simultaneously representing two conflicting interests, whether the conflict has already materialized or there exists a strong possibility that a conflict will arise in the future.

241. FRE 610 prohibits impeachment on the basis of religion. A revised rule could list several impermissible grounds for impeachment, such as religion, parallel civil litigation, etc.

242. FRE 407 prohibits reference to the defendant's subsequent remedial measures. FRE 408 bars evidence relating to settlement negotiations and settlement offers. FRE 409 precludes evidence of the defendant's willingness to pay medical bills. FRE 410 makes plea discussions inadmissible. FRE 411 prohibits evidence of liability insurance. FRE 412 is the rape shield law. All of these rules limit the admissibility of otherwise relevant evidence in order to advance policy objectives.

243. Wayne F. Foster, Annotation, *Right to Cross-Examine Prosecuting Witness as to his Pending or Contemplated Civil Action Against Accused for Damages Arising out of Same Transaction*, 98 A.L.R.3d 1060, § 2(a) (2004) (noting that "[t]he general rule is that it is proper for the accused to cross-examine the prosecuting witness as to his pending or contemplated civil action against the accused").

244. See generally *United States v. Abel*, 469 U.S. 45, 52 (1984) (stating that impeachment on grounds of bias is generally relevant).

245. E.g., Kirk Johnson, *Twist in Bryant Rape Case as Accuser Files Lawsuit*, N.Y. Times, Aug. 11, 2004, at A13 (noting that the filing of civil suit subjected the accuser to impeachment by the defense in the criminal prosecution of Kobe Bryant); Martin Kasindorf, *Jackson Defense Strategy: 'A Lot of Witnesses'*, U.S.A. Today, May 2, 2005, at 5A (reporting that Michael Jackson's defense attorney sought to impeach the accuser's family because they had filed a civil lawsuit).

246. E.g., Bryan Dickerson, *Rape Victims Rarely Sue—Cost Too High*, Detroit Free Press, May 17, 2000, at 1B, available at [http://www.freep.com/news/metro/dicker17\\_20000517.html](http://www.freep.com/news/metro/dicker17_20000517.html) (reporting on a lawsuit by a rape victim against her alleged assailant).

relevance to the accusers' credibility in a criminal prosecution.<sup>247</sup> The fact that a purported victim of sexual abuse or domestic violence seeks a civil remedy is not surprising. Criminal prosecutions generally do not afford any monetary relief to accusers. Indeed, it would be more noteworthy if the accuser did not file a civil lawsuit, because the burden of proof and the evidentiary rules are much more favorable to civil plaintiffs than to the prosecution in a criminal case.<sup>248</sup> Defendants in criminal prosecutions have sometimes attempted to impeach accusers on the ground that the accusers did not file any civil lawsuits.<sup>249</sup> If accusers genuinely believed they were victims of crime (by definition, an intentional tort), why wouldn't they bring civil claims? Further, the notion that a civil suit gives rise to bias falsely presumes some baseline level of neutrality—as if the accuser would be an impartial witness in the criminal case but for her financial stake in the civil suit.<sup>250</sup>

Second, impeachment based on simultaneous civil litigation is highly prejudicial in a criminal prosecution. When jurors hear that the accuser stands to gain financially from a guilty verdict, the jurors react with a revulsion that is disproportionate to the importance of this fact.<sup>251</sup> The tendency of jurors to place undue significance on financial matters has led to the promulgation of FRE 411, which prohibits jurors from learning that a civil defendant is insured. Because the civil remedial system is essentially “insurance” that redresses torts, why should the jurors learn that the accuser is availing herself of this system? Such knowledge may actually cause prejudice against the defendant. Crime victims will only sue defendants with deep pockets; suits against “judgment-proof” defendants would be

---

247. The defendant has a right to impeach only where the impeachment grounds are relevant. *Compare* *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (overruling the trial court where the prohibited impeachment would have done significant damage to the prosecution's case), *with* Fed. R. Evid. 412 (determining, as a categorical matter, that the relevance of an accuser's consensual sexual history is outweighed by its prejudicial effect in a rape prosecution).

248. For example, the Sixth Amendment right of confrontation is unavailable to defendants in civil cases.

249. *E.g.*, *State v. Sexsmith*, 57 P.2d 1249, 1250 (Wash. 1936) (concerning a defendant who sought to cross-examine the accuser about why he had decided against filing a lawsuit, the Washington Supreme Court found no error in trial court's ruling prohibiting this questioning).

250. *Reeves v. State*, 432 So. 2d 543 (Ala. Crim. App. 1983) (finding no harm where the defendant was prohibited from cross-examining the accuser about her parallel civil litigation seeking damages for rape, because the nature of the alleged crime made her highly prejudiced against defendant irrespective of her potential to recover damages); *People v. Murray*, 261 P. 740 (Cal. Dist. Ct. App. 1927) (finding no error in prohibiting cross-examination of the accuser regarding her civil complaint, because the purpose of this cross-examination was to show her hostility toward the defendant, which was amply apparent in her testimony during the criminal prosecution).

251. *Dickerson*, *supra* note 246 (noting that “[a]lthough the public has little difficulty appreciating an ordinary assault victim's desire for restitution, some jurors are more suspicious when a rape victim brings all her legal remedies to bear”).

futile.<sup>252</sup> So the introduction of evidence regarding a parallel civil suit tells the jury more about the defendant's assets (a potentially prejudicial fact) than about the accuser's bias.

Third, impeachment of accusers by reference to civil litigation has the unfortunate effect of discouraging such litigation. When the accuser knows that she will be raked over the coals in a criminal trial if she files a civil claim, she may opt to forego the tort remedy in order to strengthen her credibility as a witness for the prosecution.<sup>253</sup> A one-year statute of limitations for tort claims in many states<sup>254</sup> does not give the victim the luxury of waiting until the conclusion of the criminal case before filing the tort claim. Civil suits against rapists and batterers are not always lucrative, and do not signal such strong social condemnation as a criminal prosecution, but the civil strategy needs to be nurtured, especially after the Supreme Court has constrained criminal prosecutions with new hearsay rules<sup>255</sup> and has struck down federal civil remedies for violence against women.<sup>256</sup>

The potential friction between a criminal prosecution and a victim's civil litigation illustrates the necessity for a trilateral adversarial model. Of course, the defendant is adversarial to the accuser/plaintiff in both contexts. Perhaps surprisingly, the prosecution and the victim are often at odds as well. The prosecutor shudders at the thought of the wide-ranging discovery that is permissible in the civil suit. The prosecutor also worries that a settlement of the civil suit might undermine the victim's willingness to go forward with the criminal case. To be sure, both the prosecution and the defense would probably prefer that there were no civil claims at all. Even if the prosecutor were inclined to assist the defendant's civil action, ethical rules preclude attorneys from using criminal proceedings to influence civil cases.<sup>257</sup>

Criminal trials do not remediate. They castigate or vindicate. Because neither of these results provides adequate redress to the victim, it is understandable that she may pursue a civil claim alongside the criminal prosecution. The law should not penalize victims who seek recourse in both settings; the law should encourage them.

---

252. John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGeorge L. Rev. 689, 699 (2002) (recognizing that perpetrators' lack of assets forecloses tort litigation in many cases).

253. Dickerson, *supra* note 246 (stating that "[m]any rape victims . . . conclude that forswearing any interest in civil damages is the price they must pay to establish their own credibility" as a witness in the criminal prosecution).

254. Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 Or. L. Rev. 945, 1015-19 (2004) (noting that a one-year statute of limitations is a significant obstacle to tort suits by battered women).

255. See *supra* Part II.A.1.

256. *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating VAWA's civil remedy for exceeding federal power to regulate interstate commerce).

257. Sarno, *supra* note 229.

### C. Fortification of Victim-Counselor Privilege

The time has come to strengthen the evidentiary privilege for communications between victims and counselors. Presently a majority of states recognized such a privilege, but in many states the privilege is “qualified” rather than “absolute.”<sup>258</sup> In other words, a qualified privilege could yield when the defendant proves that the impeachment material he seeks is relevant to his defense and unavailable from any other source. An absolute privilege would be preferable, so that victims of domestic violence and sexual assault may speak candidly to their counselors without fearing the revelation of their confidences in court.

In the related context of the patient-psychotherapist privilege, the Supreme Court has recognized that an absolute privilege is necessary to realize the policy objective of fostering effective treatment:

Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.<sup>259</sup>

This rationale applies with equal force to counseling for accusers in prosecutions of domestic violence and sexual assault. The assurance of confidentiality is necessary for these victims to receive effective counseling.

In addition to its value in fostering therapy, an absolute victim-counselor privilege would exclude highly prejudicial evidence that has scant relevance. Jurors sometimes overreact when they learn that a victim has sought counseling.<sup>260</sup> This fact does not indicate the mental frailty of the victim; more likely it indicates just the opposite. The uninhibited communication between victim and counselor—veering into the victims’ secret fears, desires, and self-doubt—could inflame the jury’s prejudice. Moreover, there is a risk that a victim’s reference in counseling to her prior sexual history would allow the defendant to make an “end-run around rape shield laws” if the communication were not subject to an absolute privilege.<sup>261</sup>

Some critics have noted the difficulty of determining exactly who qualifies as a “counselor” of a rape victim or battered woman. In many jurisdictions, the position of counselor does not require professional certification or state licensure. Yet states could easily establish procedures for certifying certain counselors as qualifying for the protection of the

---

258. Hebert, *supra* note 40, at 1466-71.

259. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

260. *Wilkinson-Ryan*, *supra* note 46, at 1388-97.

261. *Id.* at 1375.

privilege. Further, other privilege rules have covered relationships that are far harder to define than the victim-counselor relationship, such as the clergy-penitent relationship. Courts will occasionally need to make difficult decisions in order to establish the boundaries of the victim-counselor privilege, but counselors' concern for victims will lead them to proceed cautiously so that they can protect victims' confidences.

Critics have also raised constitutional objections to an absolute privilege for victim-counselor communications. Arguably, such a privilege would deny defendants access to critical impeachment material, violating their Sixth Amendment right to confront witnesses against them. In *Davis v. Alaska*, the U.S. Supreme Court found a violation of the Sixth Amendment where the defendant could not gain access to evidence he needed to impeach an accuser on grounds of bias.<sup>262</sup> Yet counseling records do not necessarily implicate the defendant's constitutional rights. The rape shield law, which reflects a similar balancing of probative value versus prejudicial effect, has been upheld repeatedly despite constitutional challenges.<sup>263</sup> States with absolute victim-counselor privileges have upheld their constitutionality as well.<sup>264</sup>

An absolute privilege for victim-counselor communication would address the primary concern of the trilateral adversarial model: Victims cannot rely on prosecutors to enforce zealously an amorphous "qualified" privilege. A clearly defined, predictable privilege would give victims both solace and independence.

#### D. Reform of Rape Shield Laws

Rape shield laws require a number of modifications to realize their dual purposes of protecting accusers' privacy and minimizing disincentives for reporting. First, the shield laws should include strict penalties for knowing disclosure of the accusers' sexual history by parties, lawyers, or court personnel who learn this information in secret in camera hearings. This information should be protected as carefully as wiretap information.<sup>265</sup> While courts have virtually no power to prevent the media from reporting leaked information, courts can impose severe sanctions on insiders who disclose secrets to the media.

Second, accusers must have standing to pursue interlocutory review of adverse rulings on the admissibility of the accusers' sexual history.

---

262. *Davis v. Alaska*, 415 U.S. 308, 319-21 (1974).

263. For a constitutional analysis of rape shield laws, see Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *Geo. Wash. L. Rev.* 51, 153-61 (2002), and J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 *U. Pa. L. Rev.* 544, 589-90 (1980).

264. *E.g.*, *People v. Foggy*, 521 N.E.2d 86, 90 (Ill. 1988); *Commonwealth v. Wilson*, 602 A.2d 1290, 1297 (Pa. 1992).

265. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 establishes criminal penalties for unauthorized disclosure of wiretap information. 18 U.S.C. §§ 2510-2520 (2000).

Presently, only a few states give prosecutors the right to seek interlocutory review of rulings under the rape shield law, and no state gives accusers such standing.<sup>266</sup> As noted previously, victims cannot rely on prosecutors to vindicate their privacy concerns. Further, if trial courts do not face immediate accountability to higher courts for their rulings on the accusers' sexual history, there will be natural inclination to err on the side of admission. After all, victims have no standing to appeal, and prosecutors' appellate rights are extremely limited; only defendants have strong appellate rights on evidentiary issues.<sup>267</sup>

Third, the exceptions to the rape shield laws should be narrowed somewhat. Evidence of prior consensual sex between the accuser and the defendant should not be automatically admissible: Such a rule implies that women waive their right to say "no" if they ever consent to sex with a particular partner. The law should set a higher threshold for relevance, perhaps by imposing a temporal proximity requirement or a balancing test that requires the probative value to outweigh prejudicial effect. Similar restrictions are appropriate for the shield laws' second exception, which allows evidence of sex with others to show that a different man was the source of injury or bodily fluid found on the victim. The negligible relevance of residual semen from a consensual partner will rarely outweigh the prejudicial effect of this evidence. Pattern jury instructions will be useful in cautioning jurors against overreliance on such evidence, if the judge chooses to admit it.

Fourth, the rape shield laws should prohibit not only direct discussion of the accusers' prior sexual activity, but also indirect evidence and allusions to such activity. Recent cases have admitted diaries that seem to refer in general terms to sexual conduct, and evidence of prior "relationships" that were evidently sexual in nature.<sup>268</sup> If defendants can so easily circumvent the shield laws by referring indirectly to improper topics, the laws will be of little value. The courts should severely discipline counsel who refer in any way to topics that are off limits under the shield law. Some counsel brazenly allude to inadmissible sexual history because they know that the most likely sanction will simply be a sustained objection.<sup>269</sup> Perhaps the court should punish such tactics by requiring the offending attorney to pay the victim's counsel fees.

Fifth, the rape shield law should specify that any defendant who successfully introduces the accuser's sexual history cannot demand

---

266. *E.g.*, Ark. Code Ann. § 16-42-101(c)(3) (West Supp. 2005); Or. Rev. Stat. § 40.210(4)(c) (2003).

267. Anderson, *supra* note 263, at 95 nn.230-32 (noting that most appeals addressing the application of rape shield laws have been brought by defendants).

268. *See supra* note 125.

269. In one case, defense counsel sought to sidestep limitations on sexual history evidence by simply asking, "Do you know what that feels like . . . [t]o have somebody climax inside of you?" The judge sustained the prosecution's objection on the basis of the rape shield law, but the court did not discipline the defense attorney. Taslitz, *supra* note 18, at 85.

exclusion of his own sexual history, either in the criminal prosecution or in a subsequent civil case arising from the same facts. It is no small irony that one year after Kobe Bryant's defense team insisted that exclusion of the accuser's sexual history would prevent a fair trial, the defendant was not held accountable for his own sexual history in the civil case.<sup>270</sup> There is precedent in the Federal Rules of Evidence for an equitable theory of waiver when the defendant has introduced evidence of the victim's character and thereafter seeks to bar similar evidence of his own character.<sup>271</sup> What's good for the goose is good for the gander.

These various revisions of the rape shield laws are vital because the prosecution's interests in privacy issues do not always align with the victims' interests. In a bipolar paradigm, prosecutors might naturally favor the disclosure of the victims' embarrassing history, so as to extinguish possible appellate grounds and avoid creating the impression that the prosecution is concealing evidence from the jury. A trilateral model for the conflicting interests in the courtroom recognizes that the victim needs guarantees, irrespective of the prosecutor's vigilance, that her privacy will not be sacrificed.

#### E. Liberalized Use of Prior Consistent Statements

Generally, it is far easier to impeach an accuser with prior inconsistent statements than to rehabilitate with prior consistent statements. Where prior statements are used primarily to attack, rather than support, the accuser, this asymmetry compounds the accuser's resentment of the legal system. The rules of evidence should be amended to reduce the disparity in the admissibility of consistent and inconsistent statements. This reform would enhance truth seeking and would promote the fair treatment of witnesses.

Presently, the rules regulating the admission of prior consistent statements are under-inclusive in many respects. FRE 801(d)(1)(B)<sup>272</sup> and its state counterparts only allow prior consistent statements after a very particular type of impeachment—a suggestion of fabrication or improper influence—excluding other common impeachment grounds, such as allegations of honest bias or fading memory.<sup>273</sup> Not only does Rule 801(d)(1)(B) require a motive to lie, but the rule requires that this motive

---

270. Mike McPhee, *Bryant Deposition in Tussle*, Denver Post, Dec. 7, 2004, at B2.

271. E.g., Fed. R. Evid. 404(a) (providing that the government cannot lead off with evidence of the defendant's character for violence, but if the defendant puts the victim's character for violence at issue, then the government can prove that the defendant has the traits he imputed to the victim).

272. FRE 801(d)(1)(B) provides, in pertinent part, as follows:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Fed. R. Evid. 801(d)(1)(B).

273. *Id.*



must have arisen recently.<sup>274</sup> In other words, if a defendant alleges that an accuser conjured up a battery charge because she has wanted a divorce for the last five years, her motive might not be sufficiently “recent” to allow rehabilitation with prior consistent statements. Finally, the U.S. Supreme Court has interpreted FRE 801(d)(1)(B) to require that the consistent statement must have preceded the inception of the motive to lie.<sup>275</sup> The required temporal sequence is not always easy to discern: For example, when a defendant claims his former spouse fabricated an abuse claim because she anticipated a custody battle, how can the court pinpoint the date when the motive to lie arose? Where no discrete time period can be ascertained, it is impossible to assess whether the consistent statement is truly antecedent, and Rule 801(d)(1)(B) will not apply.<sup>276</sup>

This restrictive approach to prior consistent statements contrasts sharply with the rules for prior inconsistent statements. Most states allow substantive use of a prior inconsistent statement merely upon a showing of inconsistency, with no additional requirements relating to the recency of the statement,<sup>277</sup> and few requirements for the setting of the statement.<sup>278</sup> The wide divergence of the rules for prior consistent statements and prior inconsistent statements leaves the impression that the law would rather embarrass witnesses than restore their credibility.

A better approach would be to admit any prior consistent statement after an attack on the witness’s credibility makes the statement relevant, provided that prejudice does not substantially outweigh probative value. Such a rule would offer several advantages. First, it would end some courts’ confusing practice of admitting prior consistent statements for “nonsubstantive purposes” when the statements do not meet Rule 801(d)(1)(B)’s requirements.<sup>279</sup> Second, the amended rule would potentially allow juries to consider a new set of statements for their truthfulness without a temporal cutoff that may or may not coincide with the boundary of relevancy in a

---

274. *Id.*

275. *Tome v. United States*, 513 U.S. 150, 158-60 (1995) (ruling that prior consistent statements by an alleged victim of child abuse were not admissible under FRE 801(d)(1)(B) because the statements did not necessarily predate the inception of the accuser’s alleged motive to lie—her interest in living with her mother rather than the defendant).

276. *Id.*

277. David F. Binder, *Hearsay Handbook* § 39:2 (4th ed. 2001) (noting that no state imposes recency requirements for prior inconsistent statements); *see* Fed. R. Evid. 801(d)(1)(A) (same).

278. Fed. R. Evid. 801(d)(1)(A) (stating that most states follow the federal approach and require that a prior inconsistent statement must have been made in a trial, hearing, grand jury, or deposition, but a sizeable minority of states do not require any particular setting).

279. Professor Lynn McLain notes that “[m]ost post-Federal Rules of Evidence cases in the lower courts have permitted the use of statements not qualifying under [FRE 801(d)(1)(B)], but nonetheless relevant to the witness’s credibility, for the limited purpose of rehabilitation only, and not as substantive evidence.” Lynn McLain, *Post-Crawford: Time to Liberalize the Substantive Admissibility of a Testifying Witness’s Prior Consistent Statements*, 74 UMKC L. Rev. 1 (forthcoming Dec. 2005) (manuscript at 17, on file with author).

particular case.<sup>280</sup> Finally, and most importantly for present purposes, the new rule would ensure that the accuser is not simply a punching bag during cross-examination: Attacks on credibility could be parried with prior consistent statements just as easily as attacks on credibility could be mounted with prior inconsistent statements.

#### F. *Greater Symmetry in Rules Regulating Character Evidence*

Congress and state legislatures should consider reducing, but not limiting altogether, the disparity between the treatment of character evidence regarding the accused and character evidence regarding the accuser. The current asymmetry causes difficulty for both the defendant and the victim.

To begin with, evidence of “prior bad acts” by the accuser should be subject to the same notice requirements that are applicable when the government offers such evidence concerning the accused. In passing the rape shield laws, Congress and state legislatures inserted a pretrial notice requirement of fourteen days, reflecting an understanding that the difficulty of cross-examination increases when accusers do not know in advance what embarrassing evidence they will face at trial.<sup>281</sup> If such notice is appropriate for evidence of prior sexual conduct, then notice also seems necessary for evidence of other extrinsic conduct under Rule 404(b). Requiring that defendants give pretrial notice of 404(b) evidence would not violate their due process rights. As in the case of notice by the government to defendants, the requirement could be waived upon a showing that the proponent was not aware of this evidence, or the need for this evidence, before the deadline for notice. The defendant should have little difficulty foreseeing the need to offer 404(b) evidence against the accuser, because virtually every accuser must testify in a prosecution of domestic violence or sexual assault after *Crawford*. In any event, “trial by ambush” is not a constitutional right. The evidentiary rules do not tolerate the introduction of an accuser’s sexual conduct by surprise, and they should not tolerate the introduction of other extrinsic acts by surprise either.

Congress should also eliminate FRE 413 and 414, which allow the prosecution to offer any evidence of prior similar crimes by a defendant charged with child molestation or sexual assault, even if that evidence would not otherwise be admissible under FRE 404(b). Few states have adopted such rules, but some commentators and legislative leaders have urged the replication of FRE 413 and 414.<sup>282</sup> These rules are objectionable for many reasons. To begin with, they posit that the rationale for excluding evidence of extrinsic acts has varying importance depending on the

---

280. *Tome*, 513 U.S. at 169-76 (Breyer, J., dissenting) (noting that prior consistent statements could be relevant even if they did not necessarily precede the inception of the alleged motive to lie).

281. Fed. R. Evid. 412; 6 Weinstein, *supra* note 121, at T-46 to T-50 (listing state analogs of Rule 412).

282. Thomas J. Reed, *Admitting the Accused’s Criminal History: The Trouble With Rule 404(b)*, 78 Temp. L. Rev. 201, 239, 251-52 (2005).

charge—an absurd proposition that masks Congress’s more cynical interest in appearing “tough” on unpopular crimes. Second, FRE 413 and 414 result in unequal treatment of Native Americans, who are virtually the only defendants prosecuted in federal court for crimes of violence against women.<sup>283</sup> Third—and most relevant for present purposes—the blatant disregard for defendants’ rights that is evident in FRE 413 and 414 promotes similar disregard for accusers’ privacy. In a trial where the government has introduced a long list of prior misdeeds by the accused, the trial court will naturally be inclined to allow admission of similar evidence against the accuser. This Solomon-like approach is not mandated by any evidentiary rule, but it is a fact of life in court. In other words, the fair treatment of defendants under FRE 404(b) makes the fair treatment of accusers more likely.<sup>284</sup>

Shortcomings in FRE 404(a) and its state counterparts also cry out for reform. The most common state version of Rule 404(a) allows the defendant, and only the defendant, to open the door for the admission of character evidence regarding the accuser. The defendant can open the door in two ways: (1) by attacking the accuser’s character himself, or (2) in a homicide case, by simply arguing that the alleged victim was the first aggressor. Thus, in a domestic violence case that did not lead to a fatality, the defendant may assert that the accuser was the first aggressor, but the government may not respond with evidence of the accuser’s generally peaceful character. This asymmetry must certainly be maddening for accusers, and it must heighten their aversion to criminal trials. A better approach would be to allow the government to introduce evidence of the alleged victim’s character in any case (not simply a homicide case) in which the defendant has asserted that the alleged victim was the first aggressor.

### G. Narrative Testimony at Intervals During Cross-Examination

Rule 611, which authorizes judges to supervise the mode of cross-examination, should include explicit language to allow narrative testimony by the accuser. This narrative testimony should not supplant cross-examination. The accuser should be allowed to speak briefly without interruption at intervals during cross-examination—for example, after a certain number of questions, or after the cross-examining attorney has finished a major topic. Allowing such narrative testimony would put the

---

283. Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 Ind. L. Rev. 687, 688-89 (2003).

284. In addition, accusers themselves are concerned about fair treatment of defendants. Unfair treatment of defendants may discourage future reporting by victims of domestic violence and sexual assault. Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1903-04 (2002). Failing to respect defendants’ rights in court actually increases the likelihood of recidivism. *Id.* at 1846.

United States in the company of several other nations that permit accusers to tell their stories in their own words.<sup>285</sup>

At present, one of the most exasperating aspects of trial is the tendency of the prosecutor and defense lawyer to substitute their language for the words that the accuser would have chosen. Counsel's lexicon is frequently reductive, sexist, and rife with stereotypes.<sup>286</sup> The leading questions permitted in cross-examination only allow the witness to affirm or deny the proposition set forth by counsel,<sup>287</sup> not to tell the story in her own words. Rule 613 recognizes that witnesses need an opportunity to interject their own explanations, but this rule applies only to impeachment with prior consistent statements,<sup>288</sup> leaving no formal mechanisms for accusers to speak in their own terms after impeachment alleging bias, sensory or cognitive defects, or poor character for truthfulness.

While narrative testimony is rarely permissible for victims under current law, defendants can avail themselves of this procedure. In particular, where defense counsel believes that the accused is about to lie, defense counsel can absolve herself of any complicity in unethical conduct merely by instructing the client to testify in narrative form.<sup>289</sup> Ironically, narrative testimony liberates the defense from ethical strictures, while the refusal to allow narrative testimony puts accusers in a straitjacket.

A new rule permitting narrative testimony at intervals during cross-examination would help to vent the accuser's frustration. This rule would reduce the sense of subordination that pervades rape and domestic violence trials. At the same time, the intermittent use of narrative testimony during cross-examination would not violate defendants' constitutional rights. A few courts have upheld trial courts' authorization of narrative testimony by

---

285. *E.g.*, *People of the Philippines v. Pedking Calixtro*, G.R. No. 92355 (S.C. Jan. 24, 1991), available at [www.lawphil.net/judjuris/juri1991/jan1991/gr\\_92355\\_1991.html](http://www.lawphil.net/judjuris/juri1991/jan1991/gr_92355_1991.html) (allowing narrative testimony by the accuser in a rape prosecution); Pizzi & Perron, *supra* note 239, at 42-44 (discussing liberal admission of narrative testimony by crime victims in German courts).

286. Taslitz, *supra* note 18, at 111-13 (analyzing gendered, oversimplified questioning during cross-examination in rape trials). Taslitz urges that accusers be permitted to testify in long, uninterrupted narratives. *Id.* at 115-17. The present Article, by contrast, offers a more modest proposal, suggesting that accusers have an opportunity to testify for a short period without interruption.

287. Fed. R. Evid. 611(c) (permitting use of leading questions that require "yes" or "no" answers during cross-examination).

288. Fed. R. Evid. 613(b) (allowing all witnesses other than party-opponents to explain or deny alleged inconsistent statements raised in cross-examination).

289. Nathan M. Crystal, *False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U. Ill. L. Rev. 1529, 1556 (noting that defense counsel may resort to narrative testimony if counsel believes that his client may be about to lie); Steve Morris et al., *Rules of Professional Conduct, Ethical Conflicts Facing Litigators, and Guidelines for Settlement Negotiations*, in *Civil Practice and Litigation Techniques in Federal and State Courts*, Annual Advanced ALI/ABA Course of Study 655, 727, (ALI/ABA 2005) (stating that narrative testimony "continues to be a commonly accepted method of dealing with client perjury").

vulnerable victims;<sup>290</sup> these opinions reason that the procedure helps accusers much more than it hurts defendants. Indeed, under the procedure proposed here, the defendant would still be free to ask leading questions for as long as he desired during cross-examination; the defendant would just need to let the accuser up for air from time to time.

A trilateral adversarial model is necessary to understand why narrative testimony has occurred so rarely in criminal trials to date. Victims' interests in speaking with their own voices diverge from defendants' interests in minimizing victims' involvement. Prosecutors also are reluctant to permit narrative testimony by victims, because some prosecutors fear victims will sabotage the government's case,<sup>291</sup> and even victims loyal to the prosecution will probably not follow the prosecutor's ideal order of presentation unless prompted by questions.

The victim simply needs to use her own voice at trial, and a rule change is necessary to make her voice heard during cross-examination. Two hours of answering "yes" or "no" is not testimony; it is subjugation.

#### H. *Strict Test for Pro Se Cross-Examination by Accusers*

Rule 611 should be amended so that judges have clear authority to prohibit pro se defendants from directly cross-examining their accusers in prosecutions of domestic violence and sexual assault. The revised rule should specify alternative means through which pro se accusers can indirectly confront the alleged victims. For example, the court could appoint stand-by counsel solely for the purpose of cross-examining the accuser, and the defendant could submit written questions for counsel to ask in cross-examination (subject to counsel's discretion). The United States should join the growing list of nations that prohibit or significantly limit pro se cross-examination of accusers in prosecutions of rape and other similar crimes.<sup>292</sup>

---

290. *E.g.*, *Burroughs v. State*, 366 S.E.2d 378, 381 (Ga. Ct. App. 1988) (upholding a conviction where the trial court had allowed an alleged rape victim to testify in narrative form); *People v. Collins*, No. 249568, 2005 WL 1683545, at \*2 (Mich. Ct. App. July 19, 2005) (finding no error in presenting narrative testimony by an accuser in a prosecution for sexual assault); *Chancellor v. State*, No. 06-03-00051-CR, 2004 WL 299856, at \*4 (Tex. App. Feb. 18, 2004) (declining to find that the defendant received ineffective assistance of counsel when the defense attorney failed to object to the accuser's narrative testimony in the prosecution for sexual assault).

291. Busching, *supra* note 53.

292. Among the countries that have adopted, or are considering, restrictions on pro se cross-examination are Australia, Great Britain, and Scotland. *Carr Plea for Speed on Rape Victim Bill*, Fairfax Sun-Herald, Aug. 24, 2003, available at <http://www.smh.com.au/articles/2003/08/23/1061529376490.html?from=storyrhs> (describing Australian reforms); Government's Crime Reduction Strategy (July 16, 2001) <http://www.crimereduction.gov.uk/crsdoc9.htm>; *New Rape Law 'Will Protect Victims'*, BBC News, Nov. 1, 2002, [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/2384143.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/2384143.stm) (discussing new laws in Great Britain and Scotland).

The need for such a rule is manifest. A substantial number of defendants choose to represent themselves.<sup>293</sup> Pro se cross-examination provides one last opportunity for the defendant to torment the victim.<sup>294</sup> Indeed, some defendants assert the right to represent themselves solely because they want to cross-examine a youthful accuser<sup>295</sup>—perhaps in the hope that the prospect of this ordeal will dissuade the accuser from proceeding with the prosecution. One defendant accused of rape conducted a five-day cross-examination of the young accuser while wearing the same clothes he wore on the date of the charged offense.<sup>296</sup> Colin Ferguson, who shot nineteen victims on the Long Island Expressway in 1993, turned his pro se cross-examination of the survivors into a circus.<sup>297</sup>

Even when pro se defendants are not so malicious, they are usually inept. They fail to appreciate the subtle art of effective cross-examination, and they attempt simply to badger the witness.<sup>298</sup> Pro se defendants sometimes attempt to offer their own opinions during cross-examination, unaware that the rules of evidence do not permit such argument at this juncture.<sup>299</sup> Pro

293. Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. Colo. L. Rev. 789, 792 (2002) (citations omitted) (noting that a substantial number of defendants demand to appear pro se); see Burman, *supra* note 109, at 240-41 (noting that pro se defendants are entitled to cross-examine accusers in domestic violence cases under present law); Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 Suffolk U. L. Rev. 395, 412 n.93 (2005) (“[I]n the ordinary criminal [justice] context defendants representing themselves pro se do conduct cross-examinations of victim-witnesses.”).

294. Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 Utah L. Rev. 145, 146-48 (recounting the facts of the *State v. Doport* case, in which the defendant accused of raping a young girl was allowed to cross-examine her pro se; when the accuser broke down during questioning at the sentencing hearing, the accuser’s outraged father jumped up and punched the defendant, sending him to the hospital); Reardon, *supra* note 293, at 412 (expressing concern about “broadly scoped and terrorizing questioning of victims” by pro se defendants).

295. *E.g.*, *State v. Carrico*, No. 38127-0-I, 1998 WL 372732, at \*1 (Wash. Ct. App. July 6, 1998) (reporting that the defendant announced that he preferred to proceed pro se so he could cross-examine the accuser himself).

296. *New Rape Law ‘Will Protect Victims,’ supra* note 292.

297. Williams, *supra* note 293, at 811-12 (observing that “the sight of [defendant] Colin Ferguson parading up and down the courtroom and cross-examining the nineteen survivors of his shooting rampage” provoked national outcry); Larry McShane, *Ferguson’s Trial Tactics May Set Stage for Appeal*, Chi. Sun-Times, Feb. 19, 1995, at 3.

298. Christopher G. Frey, *The State v. The Self-Represented: A Florida Prosecutor’s Concerns When Litigating Against a Pro Se Defendant in a Criminal Trial*, 29 Stetson L. Rev. 181, 191 (1999). Frey wrote as follows:

Cross-examination is an art that requires practice and a full understanding of the object of the cross-examination. Pro se defendants, because they are often unskilled and unpracticed in the art of cross-examination, do not understand what they are doing or why they are doing it. They simply attack and badger the witness.

*Id.*

299. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 Fam. Ct. Rev. 36, 49 (2002) (discussing that pro se cross-examination can be argumentative).

se defendants are not subject to the ethical rules for lawyers, and they have little fear of losing their right to practice law, so they are less likely than lawyers to comport themselves in a civil manner.

To be sure, a pro se defendant has the same right to confrontation as a defendant with counsel.<sup>300</sup> Yet the trial court does not violate the pro se defendant's constitutional rights by requiring an intermediary to question the accuser. In *Maryland v. Craig*<sup>301</sup>—a 1990 ruling that withstood the more recent *Crawford* ruling<sup>302</sup>—the Supreme Court allowed some limitations on the method of cross-examination in order to protect vulnerable accusers from the hardship of an unfettered cross-examination. In particular, the Court allowed remote testimony on closed-circuit television by a child whom the defendant had allegedly abused. The Court held that the slight diminution in the immediacy of cross-examination was worthwhile to advance the policy goals of minimizing witnesses' trauma and encouraging reporting of crime by future victims.<sup>303</sup> Lower courts have used similar reasoning to limit pro se defendants' ability to cross-examine accusers directly.<sup>304</sup> Indeed, the substitution of standby counsel is far less burdensome on defendants than the remote testimony permitted in *Craig*; defendants with standby counsel can still confront the witnesses face to face, and the quality of questioning actually improves because of counsel's greater expertise.

The issue of pro se cross-examination exemplifies the disjunction of prosecutors' and victims' interests, and demonstrates once again why a trilateral adversarial model is necessary. Many prosecutors actually favor pro se representation (so long as the defendant receives an adequate admonition of the rights he is waiving). Prosecutors know that the ineptitude of the pro se defendant, combined with the unseemly spectacle of an accused rapist bullying the alleged victim in cross-examination, greatly increases the likelihood of conviction. Victims, on the other hand, view pro

---

300. *Faretta v. California*, 422 U.S. 806, 819 (1975) (stating that the accused has the constitutional right to represent himself, and he does not forfeit other constitutional rights by deciding to proceed pro se).

301. 497 U.S. 836, 853 (1990).

302. *Craig* survives *Crawford* because *Craig* addressed the type of cross-examination that is required under the Sixth Amendment, while *Crawford* addressed whether cross-examination is necessary at all. See *People v. Hinds*, No. 250668, 2005 WL 657469, at \*2-3 (Mich. Ct. App. Mar. 22, 2005) (citing *Craig*, 497 U.S. at 853, with approval after *Crawford*).

303. *Craig*, 497 U.S. at 853-54 (holding that the "[s]tate's interest in the physical and psychological well-being of child abuse victims" was "sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court" if denial of this face-to-face confrontation was necessary to protect the accuser from "emotional trauma").

304. E.g., *Fields v. Murray*, 49 F.3d 1024, 1034-37 (4th Cir. 1995) (explaining that the right to confrontation was not violated by denying pro se defendants the opportunity to cross-examine an accuser directly in a prosecution for sexually abusing a child); *State v. Carrico*, No. 38127-0-I, 1998 WL 372732, at \*1 (Wash. Ct. App. July 6, 1998) (finding no constitutional violation where the trial court prohibited the defendant from cross-examining an alleged victim of child abuse).

se cross-examination as a legally sanctioned reprisal by the assailant against whom they sought protection.

### I. *Prohibition of Appeal Waivers in Plea Agreements*

A new rule of criminal procedure is necessary to end prosecutors' practice of requiring appeal waivers as a condition for entering into plea agreements. The insistence on such waivers is commonplace.<sup>305</sup> After the recent turmoil in confrontation law and sentencing law, however, defendants are increasingly reluctant to waive their appellate rights. Survey data indicate a decline in guilty pleas and an increase in appeals based on the recent Supreme Court decisions.<sup>306</sup> In this environment, prosecutors' demand for appeal waivers is forcing more trials—and more trials mean more testimony by accusers.

A ban on appeal waivers in plea agreements would be salutary in many respects. First and foremost for present purposes, the new rule would increase the number of guilty pleas, because defendants could retain their appellate rights even if they decided not to go to trial. The appellate courts would more quickly establish the boundaries of *Crawford*, *Blakely*, and *Booker* if appeal waivers did not delay the presentation of test cases for review. Finally, as some courts have observed, plea offers contingent upon appeal waivers are against public policy because they allow prosecutors to manipulate charges and thereby evade appellate review.<sup>307</sup>

The practice of requiring appeal waivers exemplifies once again the tension between prosecutors and victims, and the need for a trilateral adversarial model. If one conceives of the criminal trial simply as a bilateral contest between the government and the defendant, then demands for appeal waivers seem to be a reasonable, efficient strategy. These demands may push some defendants to trial who would otherwise plead guilty if they could retain their appellate rights, but from the prosecutors' standpoint, that risk is more than outweighed by the time savings when

---

305. Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 Vt. L. Rev. 149, 150-51 (2003) (noting that in the federal system, ninety-five percent of all criminal cases are resolved by plea; “[m]any—if not most—of those guilty pleas are the result of plea agreements, and many—if not most—of those plea agreements contain waivers of the defendant’s right to appeal”); Alan J. Chaset, *Improving the Federal Sentencing Guidelines: Can We Get There From Here?*, Champion, June 2004, at 8 (noting that appeal waivers are “standard” and “nearly universal” in plea agreements).

306. See *infra* app. A (question 4) (providing that fifty-nine percent of respondents indicated that defendants are less likely to plead guilty after *Crawford*.); *infra* app. B (question 8) (noting that sixty-eight percent of respondents indicated that appeals of sentences had increased as a result of *Blakely* and *Booker*).

307. E.g., *United States v. Perez*, 46 F. Supp. 2d 59, 61 (D. Mass. 1999).

Despite the attraction of the idea of maximizing a defendant’s power by allowing him to sell whatever he has, the market for plea bargains, like every other market, should not be so deregulated that the conditions essential to assuring basic fairness are undermined . . . . [A]ppel waiver clauses . . . are contrary to public policy and void.



other defendants agree to forego appeals.<sup>308</sup> Victims have an entirely different view. Appeals will not require the victims' testimony, but trials will. Appeals raise the remote risk that the defendants will prevail, but victims can take comfort in the fact that the overwhelming majority of convictions are upheld.<sup>309</sup> So the utility of appeal waivers is lost on victims, but the burden of additional trials falls heavily on victims.

Prosecutors should earn their paychecks by litigating appeals. When they insist on appeal waivers and thereby increase the number of trials, prosecutors shift the burden from the government to the victims. If defendants could appeal more, then the criminal justice system would appeal more to victims.

### *J. New Sentencing Guideline for Acceptance of Responsibility*

All states should adopt straightforward sentencing guidelines—or statutes in states without sentencing guidelines—to clarify the sentencing discount that defendants will receive if they plead guilty in advance of trial. The new rules should impose a plea deadline of at least ten days before trial, although this deadline should be suspended when the government has failed to provide discovery of all the material evidence before the plea deadline.

Such an approach would be preferable to the present mishmash of unpredictable rules, departures, and “informal understandings” that determine the plea discount in each jurisdiction. The federal sentencing guidelines include a provision, U.S. Sentencing Guidelines Section 3E1.1, that allows a sentence reduction for acceptance of responsibility,<sup>310</sup> but this provision lacks a clear deadline for guilty pleas, and it even allows a defendant who goes to trial to earn full credit for acceptance of responsibility. Among the twenty-two states with sentencing guidelines, this Article's survey revealed that none has a particular guideline specifying the conditions for, and the extent of, the plea discount; only a few of the twenty-two jurisdictions allow downward departures for guilty pleas, but the rules in these jurisdictions provide little guidance to the judges and parties.<sup>311</sup> In the remaining twenty-eight states without any sentencing guidelines, the procedure for reducing sentences after guilty pleas is generally not memorialized in a rule or statute. A study by Professor Nancy

---

308. Prosecutors fear appeals not only because of the time commitment required for appellate briefs and arguments, but also because appeals risk the possibility of creating new rules that will apply throughout the jurisdiction.

309. In fact, the reversal rate for criminal convictions is so low that the Federal Rules of Evidence allow impeachment with convictions under appeal. *See* Fed. R. Evid. 609 note.

310. U.S. Sentencing Guidelines Manual § 3E1.1(b) (2003) (authorizing a three-level reduction in the defendant's offense level if he “has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial”).

311. *See infra* app. B (questions 9 and 10).

King and others in 2005 found wide variation in the methodologies used by trial courts to compute plea discounts.<sup>312</sup>

Why is a rule preferable to roulette? Clear language delineating the timeliness requirement for a guilty plea, and providing a substantial discount for foregoing trial, will result in more pretrial dispositions and less cross-examination of accusers. It is not necessary to give a greater sentencing reduction than judges presently award; rather, it is simply necessary to codify procedures that will yield approximately the same average discounts. The federal experience with U.S. Sentencing Guidelines Section 3E1.1 has established the constitutionality of this approach, notwithstanding arguments that the plea discount burdens the exercise of the defendant's constitutional right to a jury trial.<sup>313</sup>

One additional modification to the "plea discount" rule is important: Defendants should not be eligible for this discount if they have pursued tactics that created substantial hardship for accusers. As opposed to the current federal approach, no defendant should receive credit for acceptance of responsibility if he has cross-examined the accuser at trial.

The present version of U.S. Sentencing Guidelines Section 3E1.1 conditions acceptance of responsibility not upon the accused's conduct vis-à-vis the accuser, but rather upon the defendant's alacrity in sparing the government the burden of trial preparation.<sup>314</sup> If government attorneys feel that trial preparation is so burdensome, perhaps they should consider another line of work. The bipolar paradigm has unduly stressed the convenience of prosecutors and underemphasized the hardship suffered by accusers at trial.<sup>315</sup> The new rule authorizing plea discounts should make clear that the most important consideration is not the defendants' contrition

---

312. Nancy King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 961 (2005). The various means of discounting sentences after pleas include the following:

Downward dispositional or durational departures from the presumptive or standard range, dropping sentencing enhancements, sentencing in the mitigated range or at the bottom of the standard range, capping the sentence within the standard range, or making use of discretionary alternative sentences, such as treatment programs, suspended sentences, or stayed sentences.

*Id.* at 975-76 (citations omitted).

313. *United States v. Jones*, 997 F.2d 1475, 1479-80 (D.C. Cir. 1993) (en banc) (upholding U.S. Sentencing Guidelines section 3E1.1 against attack that it penalizes the exercise of trial rights); see *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978) (finding constitutional a state rule that authorized more lenient sentences for defendants waiving a jury trial). But see King et al., *supra* note 312, at 966 (suggesting that policy and constitutional issues surrounding plea discounts are ambiguous).

314. See *supra* note 310.

315. For example, under U.S. Sentencing Guidelines section 3E1.1, when a *Bruton* problem requires a prosecutor to try a succession of defendants for the same crime, using the same witnesses, the incremental trial preparation for the prosecutor in each successive trial is negligible, but the incremental burden on the victims/witnesses may still be significant. If the sole criterion determining a defendant's eligibility under U.S. Sentencing Guidelines section 3E1.1 was the government's trial preparation, then one of the defendants in this hypothetical might merit a plea discount even though he does not enter a plea until the eve of trial (much to the chagrin of the victims in the case).

or the government's expediency, but the extent to which the defendant has burdened victims of his crime by subjecting them to cross-examination and necessitating that they prepare for trial.

### CONCLUSION

Professor Wigmore famously declared that cross-examination is the greatest engine ever invented for the discovery of the truth.<sup>316</sup> In 2005, however, that engine is in danger of overheating. A number of factors have recently compounded the difficulty of cross-examination. These factors include Supreme Court decisions that increase the likelihood and difficulty of accusers' testimony, the erosion of evidentiary privileges, greater media coverage, higher sentences that alter defendants' trial tactics, and misguided reforms designed to protect victims' rights.

Of course, cross-examination is supposed to be difficult. The seat will always be hot, no matter what the nature of the case, and no matter who is under cross-examination. When Attorney General Alberto Gonzales issued a plea for the Senate to show restraint in its interrogation of Supreme Court nominee John Roberts<sup>317</sup> these comments underscored an ineluctable truth: Cross-examination is inherently difficult, even for the most sophisticated and stalwart witness.

Yet special safeguards are necessary in prosecutions of domestic violence and sexual assault for the simple reason that the increasing tribulation of cross-examination is deterring the reporting of these crimes. The criminal justice system cannot afford to traumatize complainants. Statistics released in June 2005 show that more than 500,000 rapes and several million episodes of domestic violence went unreported over a four-year period in the United States. A significant reason for this underreporting is the victims' fear of the criminal justice system, and of cross-examination in particular.

This Article has offered a set of proposals that would pour some much-needed oil in the engine of cross-examination. The reforms listed herein would modify the admission of certain evidence regarding the accuser's sexual history, her mental health counseling, and her parallel civil litigation against the alleged assailant. Other proposals would prevent pro se cross-examination of the accused, would increase pretrial notice of certain impeachment strategies, and would prohibit prosecutors from demanding appeal waivers as a condition for plea agreements. This Article has proposed that an accuser should have her own lawyer with standing to raise evidentiary objections on the accuser's behalf. Courts should permit narrative testimony by the accuser at intervals during cross-examination, and courts should more liberally admit evidence of the accuser's prior

---

316. 5 John H. Wigmore, *Wigmore on Evidence* § 1367 (J. Chadbourne ed., 1974).

317. John Gibeaut, *Gonzales Suggests Restraint in Roberts Questioning*, A.B.A. J. E-Rep., Aug. 12, 2005.

consistent statements. Finally, states should standardize their procedures for allowing sentencing reductions when defendants forego trial.

The defendant's right to confront witnesses cannot yield to utilitarian concerns about the burden on victims. Yet within the parameters set by the Constitution, there is space to fine-tune the rules governing cross-examination. The truth-seeking goal of cross-examination will be furthered, not hindered, by proposals that alleviate victims' ordeals and ensure their attendance at trial.

APPENDIX A: RESULTS FROM SURVEY OF PROSECUTORS' OFFICES<sup>318</sup>

1. Has the *Crawford* decision significantly impeded prosecutions of domestic violence in your office?

63% answered yes (61% in California, 89% in Oregon, and 41% in Washington).

2. Are prosecutors in your jurisdiction more likely to call victims as witnesses in domestic violence prosecutions after *Crawford*?

80% answered yes (83% in California, 88% in Oregon, and 71% in Washington).

3. After *Crawford*, is your office more likely to dismiss domestic violence charges when the victim is unavailable or refuses to cooperate?

76% answered yes (80% in California, 79% in Oregon, and 68% in Washington).

4. Are defendants in domestic violence cases less likely to plead guilty after *Crawford*?

59% answered yes (48% in California, 84% in Oregon, and 48% in Washington).

5. Are battered women less safe in your jurisdiction after *Crawford*?

65% answered yes (59% in California, 82% in Oregon, and 57% in Washington).

---

318. This survey was conducted from October 2004 to January 2005. The survey involved twenty-three counties in California (which collectively included eighty-eight percent of California's population), nineteen counties in Oregon (which collectively included ninety-four percent of Oregon's population), and twenty-two counties in Washington (which collectively included ninety-six percent of Washington's population). The counties involved in the survey ranged in size from several million residents to fewer than 10,000 residents. In each county, the survey was presented to the supervisor of domestic violence prosecutions, or in the absence of such a supervisor, the survey was presented to the elected prosecuting attorney or to an attorney with substantial involvement in the prosecution of domestic violence. The survey was conducted by phone and by e-mail. Respondents were informed that their answers would not be attributed to individual offices, and that only the aggregate data would be public. Respondents had the option of answering "yes," "no," or "not applicable" in response to each question. Responses of "not applicable" were excluded from the percentage tallies. Records of all respondents' answers are on file with the author. Appendix A is reproduced in its entirety from the author's previous article, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 820-22 (2005).

6. Prior to *Crawford*, did your office rely on testimonial hearsay in more than half of domestic violence prosecutions?

54% answered yes (43% in California, 89% in Oregon, and 36% in Washington).

7. Prior to *Crawford*, did victims testify in the majority of domestic violence trials?

83% answered yes (87% in California, 76% in Oregon, and 85% in Washington).

8. Does your office rely on testimonial hearsay in more than half of all domestic violence prosecutions after *Crawford*?

32% answered yes (17% in California, 67% in Oregon, and 18% in Washington).

9. In your jurisdiction, is it more difficult to introduce 911 calls into evidence after *Crawford*?

56% answered yes (43% in California, 69% in Oregon, and 58% in Washington).

10. Do you believe that 911 calls should generally be admissible in domestic violence prosecutions after *Crawford*?

95% answered yes (96% in California, 100% in Oregon, and 90% in Washington).

11. In your jurisdiction, is it more difficult to introduce hearsay statements elicited by police from victims of domestic violence at the scene of the alleged crime?

87% answered yes (83% in California, 95% in Oregon, and 84% in Washington).

12. In particular, is it more difficult after *Crawford* to introduce such statements when you have characterized them as excited utterances?

52% answered yes (59% in California, 56% in Oregon, and 41% in Washington).

13. When subpoenaed as a witness in a domestic violence trial, is a victim likely to be cooperative with the prosecution?

9% answered yes (5% in California, 0% in Oregon, and 20% in Washington).

14. Are the majority of domestic violence charges misdemeanors in your jurisdiction?

82% answered yes (77% in California, 79% in Oregon, and 90% in Washington).

15. In your jurisdiction, are the majority of domestic violence defendants out of custody for at least a portion of the period between the initial appearance and the trial?

90% answered yes (86% in California, 100% in Oregon, and 86% in Washington).

16. In your jurisdiction, is pretrial release of defendants a factor that leads victims to recant or refuse to cooperate by the time of trial?

90% answered yes (82% in California, 94% in Oregon, and 95% in Washington).

17. Would the safety of domestic violence victims be enhanced if pretrial detention of defendants were more common?

92% answered yes (86% in California, 95% in Oregon, and 95% in Washington).

18. Does pretrial cross-examination of victims take place in more than half of domestic violence cases in your jurisdiction at the present time?

29% answered yes (43% in California, 16% in Oregon, and 25% in Washington).

APPENDIX B: RESULTS FROM SURVEY OF EXECUTIVE DIRECTORS AT STATE SENTENCING COMMISSIONS<sup>319</sup>

1. Prior to 2005, were sentencing guidelines mandatory, presumptive, or advisory in your state?

41% indicated guidelines were mandatory or presumptive; 59% indicated guidelines were advisory.

2. Are sentencing guidelines now mandatory, presumptive, or advisory in your state?

36% indicated guidelines are mandatory or presumptive; 59% indicated guidelines are advisory; 5% answered N/A.

3. Did the Supreme Court's decisions in *Blakely* and/or *Booker* decrease the predictability of sentencing in your jurisdiction during the period from June 2004 to June 2005?

78% answered yes among jurisdictions with mandatory or presumptive guidelines; 0% answered yes among jurisdictions with advisory guidelines.

4. Have the Supreme Court's decisions in *Blakely* and/or *Booker* increased the appeals of sentences in your jurisdiction?

82% answered yes among jurisdictions with mandatory or presumptive guidelines; 0% answered yes among jurisdictions with advisory guidelines.

5. Which of the following best describes your jurisdiction's response to *Blakely*?

(a) No change

(b) "Substantive fix" (enlargement of sentencing ranges in guideline grid)

(c) "Procedural fix" (submission of more issues to the jury)

(d) None of the above

55% chose (a); 14% chose (b); 27% chose (c); 9% chose (d).

---

319. This survey was conducted in the summer and fall of 2005. The survey involved all the sentencing commissions that are members of the National Association of Sentencing Commissions ("NASC"). The jurisdictions involved with NASC include the following: Alabama, Alaska, Arkansas, Delaware, the District of Columbia, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Virginia, Washington, and Wisconsin. The survey was presented to the executive director of each sentencing commission, or if this official was unavailable, to another official of the sentencing commission who had familiarity with that jurisdiction's response to *Blakely*.



6. If your jurisdiction has responded to *Blakely* with a “procedural fix,” which of the following best describes your jurisdiction’s approach?

- (a) Bifurcation of jury proceedings into guilt phase and sentencing phase
- (b) Single jury trial addressing all facts that could increase sentencing range
- (c) Both (a) and (b)
- (d) None of the above

17% chose (a); 33% chose (b); 50% chose (c); 0% chose (d).

7. If your jurisdiction has responded to *Blakely* with bifurcated jury proceedings, will your jurisdiction’s evidence code apply to the portion of the jury proceedings addressing sentencing issues?

50% answered yes; 17% answered no; 3% answered N/A.

8. Do you believe that the sentencing procedures necessitated by *Blakely* and/or *Booker* will lengthen the testimony of accusers and victims before the jury, as compared with the era preceding June 2004?

72% answered yes; 36% answered no.

9. Does your jurisdiction have a sentencing guideline that provides a sentence reduction for defendants who timely notify the government of their intent to plead guilty?

14% answered yes; 86% answered no.

10. If you answered yes to question nine, does the relevant guideline or statute take account of the defendant’s conduct vis-à-vis the victim either prior to or during trial?

0% answered yes; 100% answered no.

## *Notes & Observations*