WHEN A VICTIM'S A VICTIM: MAKING REFERENCE TO VICTIMS AND SEX-CRIME PROSECUTION

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THERE IS NO REQUIREMENT THAT A DEFENDANT BE SUCCESSFULLY PROSECUTED OR EVEN IDENTIFIED FOR A VICTIM TO BE ENTITLED TO THE RIGHTS UNDER THIS ACT.[1]

I. INTRODUCTION

In an era of victims' rights reform, where state after state has amended its constitution or enacted legislation to provide for enumerated victims' rights, gender inequality continues to effect significant impediments to progress in the criminal prosecution of sex crimes against women. This is particularly true when the crime is rape and the defendant argues that the intercourse was consensual.[2] The problem is exacerbated when women who assert that they have been victims of "non-violent" rape, or rape without externally visible trauma, find themselves wrongfully subjected to unfair burden shifting at trial.[3]

The issue gained recent media attention in the case of *People v. Bryant*.[4] The case involved a female lodge attendant in Colorado and LA Laker, Kobe Bryant.[5] The female attendant asserted that after Bryant's arrival to the lodge she gave him a tour of the facilities and later returned to Bryant's room, at his request.[6] After some consensual kissing, Bryant began groping the attendant in

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[1] UNIF. VICTIMS OF CRIME ACT § 101 cmt. crime (1992), 11 U.L.A. 245 (2003).

[2] *See infra* notes 47-48 and accompanying text.

[3] *See infra* notes 43-46 and accompanying text.

[4] Order Re Mr. Bryant's Motion to Preclude References to the Accuser as the "Victim," People v. Bryant (Colo. Dist. Ct. 2004) (No. 03 CR 204), *available at* http://www.courts.state.co.us/exec/media/eagle/05-04/ordr_re_victim_issue.pdf.

[5] Order Re Probable Cause Determination, People v. Bryant (Colo. Dist. Ct. 2003) (No. 03 CR 204), *available at* http://www.courts.state.co.us/exec/media/eagle/1003/ordr_re_probable_cause.pdf.

[6] *Id.* at 3-4.

a sexual manner.[7] According to the attendant, she then tried to leave, but Bryant grabbed her by the neck, bent her over a chair, and engaged in sexual intercourse with her.[8] A subsequent sexual assault exam indicated trauma that likely occurred within twenty-four hours and that was inconsistent with consensual sex.[9] In situations similar to the circumstances surrounding the criminal case against Bryant, the defendant enjoys a presumption of innocence while the victim must struggle to overcome misplaced presumptions of promiscuity and poor judgment.[10]

To understand the magnitude of the continuing problem of rape, one need only consider that in 2002, according to the National Crime Victimization Survey (NCVS), 247,730 rapes and sexual assaults in the United States were committed against victims over the age of 12.[11] The 2003 Uniform Crime Report (UCR), which classifies rape as "the carnal knowledge of a female forcibly and against her will," estimated that 93,433 forcible rapes occurred nationwide.[12] Based on U.S. Census Bureau estimates, these statistics equate to 63.2 forcible rapes reported per 100,000 females[13] with a national arrest rate of nine per 100,000 inhabitants.[14] However, with arrests made in just over fifty-percent of all reported sexual assaults, and an estimated sixty-one percent of rapes unreported, these statistics indicate that the state will only incarcerate one in every sixteen rapists.[15]

One particularly contentious part of the process of complaint, investigation, and adjudication, in the case of rape or sexual assault, is the determination

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[7] *Id.* at 4.

[8] *Id.*

[9] *Id.* at 5-6. Interestingly, the court found it important to note that the attendant admitted to engaging in sexual intercourse with another man two days prior to the incident with Bryant. *Id.* at 6.

[10] *See infra* notes 38-46 and accompanying text.

[11] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2002, at 2 (2003) [hereinafter CRIMINAL VICTIMIZATION], *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv02.pdf. Of the total, 216,090 were female. *Id.* at 10.

[12] FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2003, at 27 (2004), *available at* http://www.fbi.gov/ucr/03cius.htm.

[13] *Id.*

[14] *Id.* at 29. The disparity in the numbers between the UCR and NCVS is the result of a difference in classification and data collection. NCVS statistics are based on self-reported incidents while the UCR uses national averages and does not include rape of females under the age of consent. Furthermore, the NCVS data are a compilation of all sex offenses, while the UCR statistics are solely for forcible rapes of females.

[15] Rape, Abuse and Incest National Network (RAINN) asserts that based on analysis of U.S. Department of Justice statistics compiled by the National Center for Policy and Analysis:

> If the rape is reported to police, there is a 50.8% chance that an arrest will be made. If an arrest is made, there is an 80% chance of prosecution. If there is a prosecution, there is a 58% chance of a felony conviction. If there is a felony conviction, there is a 69% chance the convict will spend time in jail. So, even in the 39% of attacks that are reported to police, there is only a 16.3% chance the rapist will end up in prison. Factoring in unreported rapes, about 6% of rapists—1 out of 16—will ever spend a day in jail. 15 out of 16 will walk free.

http://www.rainn.org/statistics/punishing-rapists.html. For an in-depth analysis of rape complaint and criminal case clearance rates in light of rape law reform see Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72 (2001).

of when a victim is in fact a *victim*, or more precisely, when the prosecution may refer to the victim as the *victim*. Whether use of the term victim is prejudicial, violates the presumption of innocence, or invades the province of the jury are matters often argued *in limine*. The court's resolution of the issue often varies from jurisdiction to jurisdiction, and within those jurisdictions, from judge to judge. Some courts allow the prosecution to use the term victim, alleged victim, or accuser,[16] and others preclude the use of any such reference altogether.[17]

It is not difficult to discern that gender inequality is at the heart of the issue when one recognizes that the issue rarely arises in any other criminal setting.[18] In the courtroom, "[w]omen uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility."[19] When a sexual act has taken place between a man and a woman and the man asserts that the penetration was consensual, our legal system immediately calls the status of the victim into question.[20] In this situation, courts attempt to demonstrate sympathy for the victim by affording her statutory or constitutional remedies and protections provided by the local victims' rights legislation, but remain skeptical of her veracity because of her presumed inherent female propensity for promiscuity and general indiscretion.[21]

This Note argues that reference to the victim as the *victim* is not unfairly prejudicial, does not violate the presumption of innocence, and does not invade the province of the jury. Rather, use of the term *victim* accords with the presumption of validity of a complaint made by a victim-witness and courts should permit its use until evidence rebutting the presumption is discovered. Holding otherwise creates a presumption of invalidity of a complaint, unfairly impinges

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[16] For example, in *People v. Bryant*, the court precluded use of the term *victim* during trial. Instead, the order issued provided that the court would refer to the victim as "alleged victim" while the prosecution and any parties would refer to her by her proper name. Order, *Bryant* (No. 03 CR 204), *supra* note 4.

[17] *See, e.g.*, Jackson v. State, 600 A.2d 21, 25 (Del. 1991) (use of the term victim "should be avoided in the questioning of witnesses in situations where consent is an issue"); State v. Wright, 2003 Ohio App. LEXIS 3208, *5 (Ohio Ct. App. 2003) ("[T]he trial court should refrain from using the term 'victim,' as it suggests a bias against the defendant before the State has proven a 'victim' truly exists.").

[18] *See generally* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986). Estrich argues that, in contrast to the crime of rape, with crimes such as trespass or robbery the court rarely shoulders the victim with the burden of proving lack of consent, or force, to overcome a presumption of diminished credibility. *See also*, 140 CONG. REC. H8968, 8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari concerning the prior crimes evidence rules for sexual assault cases):

> [A]dult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes-the accused mugger does not claim that the victim freely handed over this wallet as a gift-but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.

[19] Judith Resnik, *Gender Matters, Race Matters*, 14 N.Y.L. SCH. J. HUM. RTS. 219, 225 (1997) (citing the results of the New York Judicial Committee on Women in the Courts, Report of the New York Task Force on Women in the Courts, republished at 15 FORDHAM URBAN L.J. 11, 17-18 (1986)).

[20] *See infra* notes 43-46 and accompanying text.

[21] *See infra* notes 43-46, 60-63, and accompanying text.

on the veracity of the accuser without merit, and fosters conventional prejudices against rape victims.

Section II of this Note briefly discusses the historical development of the law of rape, the critical issue of consent, rape mythologies, and victims' rights legislation. Section III analyzes the argument that a victim should be considered a *victim* from the time the allegation of rape is made until the conclusion of the trial or until evidence to the contrary is presented. In doing so, this Note considers whether the use of the term *victim* creates a prejudicial effect, violates the presumption of innocence, is an improper expression of veracity or guilt, or invades the province of the jury.

II. HISTORICAL DEVELOPMENT

While rape is a crime with ancient roots, the concept of what constitutes rape is continually evolving.[22] Increased social awareness coupled with a greater understanding of such concepts as sexual autonomy and equality, changing gender roles, and the socio-psychological impact of victimization, have contributed to the evolution of the elements of rape, their scope, and potential defenses.[23] As a result, to understand the court's apprehension in recognizing a victim as a *victim* in a rape trial one must first understand the history of the evolving crime of rape, rape mythology, and the development of victims' rights legislation.

A. *Brief History of Rape Prosecutions*

1. *Elements of Rape—Generally*

Most state statutes define rape as the penetration of a person, however slight, without that person's consent.[24] This definition is deliberately broad and accommodates both traditional and evolving notions of the crime of rape.[25] While the defendant may challenge identity or penetration, when those elements are not in dispute the critical issue upon which the case turns is whether the victim consented, or whether the defendant reasonably believed the victim consented, to the penetration.[26]

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[22] *See* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence Of Consent*, 92 COLUM. L. REV. 1780 (1992). In his article, Dripps discusses various forms of rape law, as it existed in ancient Roman and early English form, and how the law evolved as a response to various social, economic, and intellectual forces and development. *See also* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 1 (1977) ("Rape, like murder, has an ancient, if scarcely honorable, lineage.")

[23] *See infra* notes 30-37 and accompanying text.

[24] *See, e.g.*, CAL. JURY INSTRUCTIONS, CRIMINAL (CALJIC) 10.00 (7th ed. 2005) (CALJIC provides, *inter alia*, that "[e]very person who engages in an act of sexual intercourse with another person . . . against that person's will . . . is guilty of the crime of rape. Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. 'Against that person's will' means without the consent of the alleged victim.").

[25] *See infra* text accompanying notes 32-37.

[26] Consider, for example, a woman's withdrawal of consent after consensually engaging in sexual acts that do not involve intercourse. *In re John Z* was a case where identity and penetration were not at issue because the defendant admitted to engaging in the sexual activ-

The prosecution can prove a victim's lack of consent by showing incapacity to consent, direct or implied force or duress, intoxication, unconsciousness, or fraudulent inducement.[27] However, in a society where some have argued that cultural attitudes toward intercourse, foreplay, and seduction include notions of violence, dominance, and passivity,[28] even credible evidence of these indicators may be insufficient to prove a lack of meaningful consent. This issue is particularly problematic in states that allow for a reasonable belief, or reasonable mistake, of consent defense.[29]

2. *Evolution of the Concept of Rape*

Rape is an ancient crime. Yet despite the ancient roots, rape is an offense that goes largely unreported.[30] However, there has been a recent substantial increase in public concern and legal reform that is generally associated with the growth of the women's rights and feminist movements, as well as, the gradual increase in the number of reported cases.[31]

The traditional notion of rape was that only a man could rape a woman and only then if the woman was not his wife.[32] Some jurisdictions now recognize that men can rape men,[33] husbands can rape their wives,[34] women can rape men,[35] and women can rape women.[36] This evolution from a strictly male

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ity. 60 P.3d 183, 185 (Cal. 2003). The victim initially consented to engaging in sexual acts but protested when the defendant attempted intercourse. *Id.* at 184-85. The critical issue at trial was whether a reasonable person would believe the victim continued to consent despite her verbal withdrawal of consent coupled with physical resistance. *Id.* at 186-87. The California Supreme Court held that under such circumstances "a withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become nonconsensual intercourse." *Id.* at 184.

[27] *See, e.g.*, CAL. PENAL CODE § 261 (West 2003).

[28] *See* Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 42-43 (1993) (arguing that equating violence with eroticism makes it difficult to distinguish rape from sex).

[29] *See, e.g.*, Tyson v. Trigg, 50 F.3d 436, 447 (7th Cir. 1995); People v. Williams, 841 P.2d 961, 965 (Cal. 1992); Honeycutt v. State, 56 P.3d 362, 368 (Nev. 2002). *But see* Commonwealth v. Lopez, 745 N.E.2d 961, 967 (Mass. 2001) ("The mistake of fact defense is incompatible with the evolution of our jurisprudence with respect to the crime of rape.").

[30] *See* CRIMINAL VICTIMIZATION, *supra* note 11, at 11 (Only 53.7% of rapes/sexual assaults were reported in 2002.); Berger, *supra* note 22, at 5 (cautioning that when considering rape statistics one must remember, "[r]ape is probably one of the most under-reported crimes").

[31] *See* Dripps, *supra* note 22; Berger, *supra* note 22, at 2-7.

[32] *See, e.g.*, CAL. PENAL CODE § 261(a) (West 2003) ("Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator.").

[33] For example, Nevada's sexual assault statute is non-gender specific and defines sexual penetration as "cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body." NEV. REV. STAT. § 200.366 (2004). In *Crowley v. State*, 83 P.3d 282 (Nev. 2004), a male defendant was found guilty of sexual assault under NEV. REV. STAT. § 200.366 when he performed fellatio on a male victim. Note, in Nevada, the term "sexual assault" is used in lieu of "rape."

[34] *See, e.g.*, A.U.G. v. J.G., 300 A.D.2d 205 (N.Y. App. Div. 2002) (upholding the lower court's grant of a temporary protective order based on finding that husband raped his wife).

[35] *See, e.g.*, Commonwealth v. Hitchcock, 565 A.2d 1159, 1162 (Pa. 1989) (Papadakos, J., concurring) ("A male can rape a female by his penetration of any of the victim's orifices; a male can rape another male in the same fashion; and, similarly, a female can rape another female or male as well."). *But see*, Green v. Wyrick, 462 F. Supp. 357, 361-62 (W.D. Mo.

on female crime to a gender-neutral assault on the personal autonomy of one "person" by another "person" is the result of the recognition that the essential element that differentiates lawful intercourse from rape is a lack of meaningful consent.[37]

3. *Rape Myths and Mindsets*

Rape mythology has a substantial impact on the fairness of trial.[38] Defense attorneys play to juror held misconceptions about females and the crime of rape and use these common misconceptions to undermine the critical concepts of consent and non-consent.[39] Some common rape myths include the belief that women really mean "yes" when they actually say "no," fabricate allegations to cover up indiscretion, or "ask" for sex when they dress a certain way, or frequent a particular type of establishment.[40] These myths serve only to bolster a defendant's claim that his accuser consented, or that, at the very least, he reasonably believed his accuser had in fact consented.[41] To achieve these ends, defense attorneys frame the presentation of the circumstances surrounding the attack in a manner consistent with rape mythology so that the evidence or testimony reinforces juror bias in favor of the defendant.[42]

One of the most difficult consent myths to overcome is the misconceived notion that "real rape" produces visible proof of injury.[43] When rape victims "almost lose their life or sustain serious injuries, they have a strong case."[44] However, in cases where there are no outward signs of physical trauma, the defendant enjoys the presumption of innocence while the accuser battles the

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1978) (asserting the body of law rejecting the argument that a females can effect rape is "ever growing").

[36] *See, e.g.*, Commonwealth v. Whitehead, 400 N.E.2d 821, 828-30 (Mass. 1980) (upholding female defendants' conviction for rape for performing cunnilingus on a female victim without the victim's consent).

[37] For a general discussion of a meaningful consent standard see Robin D. Wiener, Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983).

[38] *See* Morisson Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1040-41 (1991).

[39] *See id.* at 1015.

[40] *See id.* Torrey also notes several other myths, such as "[W]omen who 'tease' men deserve to be raped; the majority of women who are raped are promiscuous . . . ; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; . . . [and] women derive pleasure from victimization." *Id.*

[41] *See generally id.* at 1040-61 (describing the effect of rape mythology on trials).

[42] *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 106 (1999) ("A lawyer who fails to appeal to race or gender bias will start losing cases if biased appeals work with juries."). In keeping with that assertion, at trial a defense attorney may attempt to elicit testimony regarding the nature of the location (e.g. a singles bar, club), and the clothes worn (e.g. short skirt, tight clothing). The purpose is to cause a juror to infer the worst about the victim from the attendant circumstances. Thus, defense counsel can present rape myth reinforcing evidence without actually saying, "you were asking for it!"

[43] LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 95 (1991) ("The myth that a *real* victim should be found lying crumpled on the ground in a pool of blood is still alive and well.").

[44] *Id.*

presumptions of consent,[45] male innocence, female guilt, and consensual rough sex.[46]

4. Swearing Contest

In light of preconceived notions established by rape mythology, the rape victim that does not exhibit physical signs of violence often finds herself at a distinct disadvantage when the trial degenerates into a swearing contest, or a case of she-said-he-said.[47] The male offender can admit that he engaged in intercourse with his accuser and assert consent, all without fear of social stigmatization.[48] The female victim, however, must prove that while intercourse occurred, it occurred without her consent, and she must do so while trying to overcome the preconceived notions established by rape mythology.[49]

5. Legal Progress in Overcoming the Burden on the Victim

Changing social awareness regarding the crime of rape has resulted in the reduction of the burden on the victim at trial. As one scholar has noted, "[o]ur sexual culture has changed. Prosecutors sometimes file charges and juries sometimes convict in cases that would have been laughed out of court twenty or thirty years ago."[50] Proof of rape at trial no longer requires corroboration.[51] Furthermore, rape shield laws now exist to prevent the defense from further victimizing the accuser on the stand, and federal and state governments have enacted victims' rights legislation to protect the victim's interest before, during, and after trial.[52]

B. Victims' Rights Legislation

As a response to the evolving concepts of rape and consent, as well as a growing awareness of the social and personal costs of victimization and the role of the victim in the legal system, Congress, and numerous state legislatures, developed laws to protect the rights of victims.[53] However, while many of

[45] *See* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U.L. REV. 663, 692 (1999) ("The history of rape prosecutions is replete with illegitimate dismissals of women's testimony and ridiculous presumptions of consent.").

[46] *See* Henderson, *supra* note 28, at 42-43.

[47] *See* David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1382 (1997) ("We found that the prosecution [in rape cases] is at a disadvantage in pure swearing contests.").

[48] *See* Stephen Schulhofer, *Unwanted Sex*, ATLANTIC MONTHLY, Oct. 22, 1998, at 55, 57. In his piece, Schulhofer notes that the obstacle in a case where consent is asserted as a defense "is not conflicting versions of the truth or questions of credibility. The man can admit to the facts, more or less with impunity." *Id.*

[49] *See supra* notes 38-46 and accompanying text.

[50] Schulhofer, *supra* note 48, at 55-56. However, "the law itself continues to pose obstacles, blocking enforcement and denying remedies even when juries are prepared to condemn defendants' conduct as outrageous." *Id.*

[51] *See, e.g.*, CAL. JURY INSTRUCTIONS, CRIMINAL (CALJIC) 10.60 (7th ed. 2005) ("It is not essential to a finding of guilt on a charge of rape that the testimony of the witness with whom sexual relations is alleged to have been committed be corroborated by other evidence.").

[52] *See infra* notes 54-63 and accompanying text.

[53] *Id.*

these legislative efforts successfully created rights for victims, many failed to address adequately who in fact qualifies as a victim or when that person may be classified as a victim. This shortfall is a critical oversight and merits immediate attention.

1. Victims' Rights Legislation/Victims' Bill of Rights

Many state legislatures have enacted statutory provisions or constitutional amendments to provide rights to victims.[54] However, efforts to pass a federal constitutional amendment to provide victim's rights, remedies, and protections against the criminal justice system have failed and are often vehemently opposed by constitutional conservatives.[55] Nonetheless, Congress has successfully passed several victims' rights statutes.[56]

2. Purpose of Victims' Rights Legislation

The common purpose of most victims' rights legislation is the enhancement and protection of the "necessary role of crime victims and witnesses in the criminal justice process" without "infringing on the constitutional rights of the defendant."[57] As noted by the drafters of the Uniform Victims of Crime Act of 1992, victims' rights legislation seeks to strike a balance in an overly offender-focused criminal system that fails to protect victims who are forced to participate "through no fault of their own."[58] Yet despite their noble purposes, those who believe the protection of victims violates the constitutional protections afforded to defendants often challenge the constitutionality of victims' rights provisions.[59]

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[54] For a comprehensive list of state victims' rights constitutional amendments and statutory provisions see Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5TH 343 (2003).

[55] *See, e.g.*, Lynne Henderson, *Exploiting Trauma: The So-Called Victim's Rights Amendment*, NEV. LAW., Apr. 2001, at 18, 18-19 (arguing that "the Constitution should be amended only when necessary," and that a victim's rights amendment is unnecessary because state and federal "legislation can accomplish most of what the [proposed] amendment provides").

[56] *See, e.g.*, Justice for All Act of 2004, 18 U.S.C. § 3771 (West. Supp. 2004); Victim Rights Clarification Act of 1997, 18 U.S.C. §§ 3510, 3593 (2000); Victims of Crime Act of 1984 (VOCA), 42 U.S.C. §§ 10601-10608 (2000); Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. § 1512 (2000).

[57] Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(a)(2), 96 Stat. 1248, (1982). "All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contract with a criminal justice system unresponsive to the real needs of such victim." *Id.*

[58] UNIF. VICTIMS OF CRIME ACT summary of contents (1992), 11 U.L.A. 240 (2003).

[59] *See, e.g.*, Rachel King, *Why A Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experiences From Crime Victims*, 68 U. CIN. L. REV. 357, 362 (2000). "[U]nder our adversarial system, it is vital to remember that it is the defendant, not the victim, who is at risk of losing life, liberty and property." *Id.* at 402. King argues that any harm a victim may incur during the criminal adjudication process pales in comparison the potential loss the defendant faces. "We must guard against the tendency towards diminution of the rights of the accused in an effort to be tough on crime, or sympathetic to victims." *Id.*

3. What Victim's Rights Accrue?

The rights that accrue often vary from state to state, but as one legal scholar noted, those rights typically include provisions for pretrial detention, speedy trial, victim participation in plea bargaining and sentencing, evidentiary rules, and restitution.[60] For example, the Nevada Constitution provides that, upon written request, the victim shall be notified of the "status or disposition of a criminal proceeding,"[61] the victim may be present at any public hearing,[62] and the victim has the right to be heard at all sentencing or release proceedings.[63]

4. When Do Victim's Rights Accrue?

In most victims' rights legislation, a victim's rights accrue regardless of successful adjudication of a claim.[64] The very nature of the rights and remedies afforded requires that certain rights accrue prior to final disposition of the criminal case. A victim cannot participate in the plea bargaining process if the rights do not accrue until the jury returns a "guilty" verdict. Therefore, generally, a crime victim's rights accrue independent of the facts of the alleged crime, including any defense asserted, or the conviction of the defendant.

The issue of when a victim's rights accrue arose in Florida when a victim of sexual assault was present during the trial of her attacker pursuant to a Florida Victims' Rights provision.[65] On appeal, the defendant in *Bellamy v. State*[66] argued that since the court had not yet found him guilty, and because his asserted defense was consent, which drew into question the validity of the accusation, his accuser was not yet a *victim*, and the court's failure to exclude her from the courtroom violated his presumption of innocence.[67] The appeals court held that such construction of the word *victim* "would undermine the purpose of the victim's rights . . . amendment," such that it would produce an absurd result, and would not accomplish the intent and purpose of the people.[68] Thus, though there had not been a final entry of judgment, and though defendant claimed consent as a defense, in terms of the victims' rights legislation, the rights of the victim had accrued and her presence in the courtroom, in accordance with those rights, did not violate the defendant's presumption of innocence.[69]

It is this struggle to define who is a victim and determine when a victim's rights accrue, taken in conjunction with the evolving concept of the crime of rape, that contribute to, and complicate, the analysis that takes place when a defendant accused of rape seeks to preclude the use of the term *victim* during

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[60] Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 967 (1985) (internal citations omitted).
[61] NEV. CONST. art. I, § 8, cl. 2(a); NEV. REV. STAT. § 176.015(4)(d) (2004).
[62] NEV. CONST. art. I, § 8, cl. 2(b); NEV. REV. STAT. § 176.015(3)(a).
[63] NEV. CONST. art. I, § 8, cl. 2(c); NEV. REV. STAT. § 176.015(3)(b).
[64] *See, e.g.*, UNIF. VICTIMS OF CRIME ACT § 101 cmt. crime (1992), 11 U.L.A. 245 (2003).
[65] FLA. CONST. art. I, § 16(b).
[66] 594 So. 2d 337 (Fla. Dist. Ct. App. 1992).
[67] *Id.* at 338.
[68] *Id.*
[69] *Id.*

trial. However, courts considering this issue cannot allow gender inequality to continue to taint the prosecution of sex crimes and must give proper weight to evolving notions of meaningful consent and the impact of rape mythology on jury deliberations.

III. ANALYSIS

Consider the following hypothetical. Sexual intercourse between a woman and a man has occurred. She says it was rape; he says it was consensual. The woman exhibits no outward signs of physical injury or trauma: no bruising, no lacerations, and no broken bones. She files a complaint, the state files charges, and as trial approaches, each side begins filing a multitude of pretrial motions. Assuming the victim's allegations are true, she is about to endure what some commentators have characterized as her second-rape at the hands of the defendant.[70]

The challenge she faces is that, given general social predisposition to rape myths, without overt indicia of force or coercion her allegations are presumptively suspect.[71] By asserting the act was consensual, the defendant puts the victim on trial before criminal proceedings begin. The defense will likely argue that she is not yet a *victim*, that reference to her as such violates the defendant's presumption of innocence, is prejudicial, and is an improper expression of a personal belief in her veracity and the defendant's guilt.[72]

The court's final resolution of the *victim* reference issue affects the trial and the justice system in many ways. The impact on the victim can be substantial. Conceivably, resolution in favor of the defense may cause the victim to withdraw from the process altogether, effectively terminating the case.[73] If she chooses to stay the course, she may doubt her role at trial, her value, and her status in the system.[74] Furthermore, the action the court takes may serve to discourage outside observers, and victims past, present, and future, from reporting sex crimes perpetrated against them, for fear of being subject to similar tribulations.[75]

Conversely, the effect on the defendant, though he would have the court believe otherwise, is marginal. If the court allows the prosecution and wit-

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[70] *See generally* Madigan & Gamble, *supra* note 43; Berger, *supra* note 22.

[71] *See supra* notes 43-46 and accompanying text.

[72] *See, e.g.*, Mr. Bryant's Motion to Preclude References to the Accuser as the "Victim" ("Defense Motion") People v. Bryant (Colo. Dist. Ct. 2004) (No. 03 CR 204), *available at* http://www.courts.state.co.us/exec/media/eagle/05-04/motion.pdf.

[73] *See generally* Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 931-32 (2001) (arguing that the undue influence of legal actors and social pressures cause rape victims to withdraw from the prosecutorial process).

[74] *See generally* Christine Kenmore, Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U. L. REV. 199, 224-25 (1984) (noting "the victim's fear of court procedures was the second most frequently cited reason for the victim's failure to cooperate after having reported a rape" and that a "victim's fear of the trial process" was the "major reason for withdrawing a complaint once filed").

[75] *See* Easton v. City of Boulder, 776 F.2d 1441, 1449 (10th Cir. 1985) (stating that discounting a sexual assault victim's credibility at the outset would discourage the reporting of such incidents).

nesses to refer to the victim as the *victim*, it is highly unlikely that such reference alone will serve to establish, in the minds of the jurors, the government's case beyond a reasonable doubt.[76] Likewise, it is unlikely that precluding use of the term victim would be the critical element that enables the defendant to triumph over prejudicial evidence of his guilt.

So why does it matter? It matters because defendants should not have a monopoly on notions of fairness in the criminal justice system. Justice also belongs to victims and society as a whole. A conviction based on facts proven beyond a reasonable doubt reinforces social norms and reaffirms society's abhorrence for the crime of rape.[77]

In order to analyze this issue properly, this Note will first consider who is a victim, and then it will address the common arguments for and against use of the term victim at trial. In doing so, this Note will consider use of the word victim in terms of due process, presumption of innocence, improper expression of veracity or guilt, and invasion of the province of the jury. Finally, this Note will consider the available options for trials where rape is the crime and consent is the defense.

A. *Who is a Victim?*

Ascertaining who is in fact a victim in any criminal context is difficult. "The law of crime victim compensation has for more than thirty years struggled with the question of who counts as a true victim of crime."[78] State criminal statutes offer little assistance,[79] often defining victim, if at all, in an *ad hoc* and inconsistent manner.[80] Federal legislation is often equally ineffective. For example, the Victim and Witness Protection Act,[81] an act that purports to provide protection and assistance to victims and witness, "neither defined 'victim' nor distinguished between victims and witnesses in principle."[82]

While state and federal statutes have attempted to define the word victim, neither has made the status contingent on the successful adjudication of the victim's claim or the defendant's conviction. For example, the Justice for All Act of 2004, defined victim as "a person directly and proximately harmed as a result of the commission of a Federal offense."[83] Black's Law Dictionary defines victim as a "person harmed by a crime, tort, or other wrong."[84] The

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[76] *See* State v. Nomura, 903 P.2d 718, 723 (Haw. Ct. App. 1995) (holding use of the term *victim* in jury instructions on elements "would not have had a substantial influence upon the jury's verdict and thus, the error was harmless").

[77] United States v. Doss, 15 M.J. 409, 412 (C.M.A. 1983) ("[E]ach criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community.") (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-405 (1958)).

[78] MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 158 (2002).

[79] *See* Schulhofer, *supra* note 48, at 55-56. "Criminal law's most obvious weak spot is its continuing vagueness—a surprise after all the effort devoted to reform." *Id.* at 56.

[80] UNIF. VICTIMS OF CRIME ACT summary of contents (1992), 11 U.L.A. 240 (2003). "There is great inconsistency among the states on the definition of 'victim.'" *Id.*

[81] 18 U.S.C. § 1512 (2000).

[82] DUBBER, *supra* note 78, at 211.

[83] 18 U.S.C. § 3771(e) (2000).

[84] BLACK'S LAW DICTIONARY 1598 (8th ed. 2004).

Uniform Victims of Crime Act ("UCVA") states that a victim is a "person against whom a crime has been committed."[85] The UCVA further qualifies this definition by stating that, "[t]here is no requirement that a defendant be successfully prosecuted or even identified for a victim to be entitled to the rights under this Act."[86]

Using successful adjudication as a victim status determinate is unsound. The rationale for the noted absence of a statutory conviction requirement is clear: some victims may never identify their assailant. Furthermore, when the victim can identify the assailant, the assailant may never be caught, and even if caught, may never be brought to trial.[87] If state and federal entities made successful adjudication of a claim the determinative factor in establishing the status of a victim as a *victim*, the rights of many victims would never accrue. Consequently, some legitimate victims would never be entitled to rights and compensatory benefits provided by victims' rights legislation. In fact, based on current crime statistics, such a requirement would effectively deny rights, restitution, counseling, and care to an estimated ninety-four percent of rape victims because the claim never ripened into a criminal conviction for the assailant.[88]

One must also consider that, contrary to some conventionally held notions, a verdict of "not guilty" is not always a declaration of the defendant's innocence. While innocence is one possible reason for a "not guilty" verdict, juries also return "not guilty" verdicts because the government failed to prove beyond a reasonable doubt one or more of the elements of the charged offense or because the jurors decided to engage in jury nullification.[89]

Imagine, for example, the woman who meets a man and returns with him to her home with nothing but the purest of intentions. The man, however, sees this offer of hospitality as an invitation to engage in sexual intercourse. The woman resists, makes her lack of consent clear and unequivocal, but is unable to fend off his assault. At this point, from an omniscient perch, few would deny that the woman in this scenario is a victim and should be regarded as such.

Now imagine that following the attack she reports the incident to local law enforcement personnel who observe that she does not exhibit any signs of visible trauma. However, based on the victim's statement, the district attorney files charges. At trial, the attacker asserts that the intercourse was consensual. Despite its best efforts, the government fails to prove beyond a reasonable

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[85] UNIF. VICTIMS OF CRIME ACT § 101(6) (1992), 11 U.L.A. 245 (2003). *See also* 725 ILL. COMP. STAT. ANN. 145/2.3 (West 2004) ("Victim means a person killed or physically injured in this State as a result of a crime perpetrated or attempted against that person."); MICH. COMP. LAWS ANN. § 780.752(1)(j)(*i*) (West 2005) (A victim is "an individual who suffers direct or threatened physical, financial or emotional harm as a result of the commission of a crime."); NEV. REV. STAT. § 176.015(5)(b) (2004) ("'Victim' includes a person . . . against whom a crime has been committed [or] who has been injured or killed as a direct result of the commission of a crime.").

[86] UNIF. VICTIMS OF CRIME ACT § 101 cmt. crime (1992), 11 U.L.A. 245 (2003).

[87] *See supra* notes 11-15 and accompanying text.

[88] *See supra* note 15 and accompanying text.

[89] Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 & n.31 (2001). Raymond argues that a verdict of "not guilty" may be the result of "burden of proof innocence," "legal innocence," or "factual innocence." *Id.*

doubt that the victim did not consent to the penetration. There are no witnesses other than the defendant and the victim, and there is no evidence of physical injury. As the system requires, the jury returns a verdict of "not guilty."

In this situation, under a system that makes successful adjudication determinative of victim status, the *legitimate* victim is no longer a victim. What then, has she become? At best, she is a victim of circumstance. At worst, she is a liar. Unfortunately, the logical consequence of such a system is that the state should then consider perjury charges and deny her care and counseling. Thus, under a system that uses conviction as a determinate of victim status, the victim who is able to identify her assailant—who is subsequently caught and charged—is treated differently from the victims who cannot identify their assailants, the victims whose assailants—identified and caught—are not charged, and those victims whose assailants are caught and charged but not convicted.

The decision of the Eagle County Colorado District Court in *People v. Bryant* demonstrates the problem of victim status determination. There the court held that Kobe Bryant's accuser was a victim for purposes of Colorado's victims' rights statutes.[90] The court afforded her many of the common rights associated with victims' rights legislation.[91] However, though the court held she was a victim for victims' rights purposes, Judge Ruckriegle also ordered that neither the prosecution, nor the witnesses, could refer to the victim as the *victim* during trial.[92] The court stated that though Colorado's criminal statute for rape defined victim as a "person alleging to have been subjected to a criminal sexual assault,"[93] the definition was not "generally known" and the common understanding of the term *victim* implies the crime has occurred.[94] Essentially, the court held that the victim would not be a *victim* in the eyes of the people of Colorado until the jury convicted Bryant of the charge of rape. Thus, by holding that the victim would be a *victim* for victims' rights purposes but not for trial, the court inappropriately applied the conviction as a determinate of status standard.[95]

However, it is the trial process, first and foremost, where the courts should consider a victim a *victim* until proven otherwise. Courts should not make criminal conviction a victim status determinate when the statutes that provide redress and remedy to victims do not make successful adjudication a requirement. To hold otherwise creates absurd results, undermines the purpose of vic-

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[90] *See* Order Re People's Motion for *In Camera* Proceedings for the Protection of Victim's Rights Re: People's Motion *In Limine*: Medical and Mental Health History of the Victim (Colo. Dist. Ct. 2004) (No. 03 CR 204); Motion for *In Camera* Proceedings for the Protection of Victim's Rights Re: People's Motion *In Limine* Re: Any Evidence of Drug or Alcohol Use (Colo. Dist. Ct. 2004) (No. 03 CR 204), *available at* http://www.courts.state.co.us/exec/media/eagle/04-04/order2.pdf.

[91] *Id.*

[92] *See* Order, *Bryant* (No. 03 CR 204), *supra* note 4.

[93] COLO. REV. STAT. § 18-3-401(7).

[94] *See* Order, *Bryant* (No. 03 CR 204), *supra* note 4.

[95] The problem with the court's reasoning here is that it gives preference to conventional definition over legal definitions and assumes that a jury instruction to the contrary would be insufficient. This logic belies the purpose of jury instructions and statutory definitions, and does so based on unfounded presumptions about the ability of the jurors to comprehend those definitions and instructions.

tims' rights legislation, and unfairly treats rape victims with unknown assailants, or assailants that have not been apprehended or convicted, differently from rape victims with known assailants.

B. When Remarks Made at Trial Should Be Suppressed—Defendant's Due Process

Defense counsel in rape trials where consent is the asserted defense often argue that the court should preclude reference to the accuser as the *victim*, because such references cause the jury to infer that a crime has been perpetrated and the defendant is guilty.[96] The general rule established by the Supreme Court regarding the admissibility of statements made at trial is that if the remarks would result in unfairness, cause a denial of due process, or are an attempt to manipulate or misstate the character of evidence, those remarks would be unfairly prejudicial and a court may properly exclude them.[97] However, during such an analysis, courts "should not lightly infer" that a jury will attribute the most damaging meaning to an ambiguous remark when there are many other less damaging meanings.[98]

1. Unfairness and Denial of Due Process

Virtually all evidence is prejudicial. "If it were not, the prosecution would not be introducing it."[99] However, to justify exclusion under Federal Rule of Evidence 403,[100] the prejudice must be *unfair*, and that unfairness must substantially outweigh the probative value. When the unfairness relates to comments made by the prosecution or its witnesses at trial, the defendant must show that the unfairness was more than the result of some implication or inference drawn from the actual statement.[101] Thus, the bar in such a claim is high.

For example, in *Donnelly v. DeChristoforo*,[102] during closing arguments, the prosecutor argued that even though the defense asked the jury to find the defendant not guilty, the defense *in reality* hoped the jury would find the defendant guilty of *something*; just not first-degree murder.[103] On appeal, the defense argued the prosecution meant to imply that the accused offered to plead guilty along with two of his counterparts, and therefore, the prosecution unfairly denied the defendant his right to due process.[104] The Court reasoned that it was illogical "to conclude that the jury would accept any implied argument of the prosecutor that . . . the defendant was any less firm in his assertion

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[96] *See, e.g.*, Defense Motion, *Bryant* (No. 03 CR 204), *supra* note 72.
[97] *See* Darden v. Wainwright, 477 U.S. 168, 181-82 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).
[98] *Donnelly*, 416 U.S. at 647.
[99] United States v. Candelaria-Silva, 162 F.3d 698, 705 (1st Cir. 1998).
[100] FED. R. EVID. 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
[101] *See Donnelly*, 416 U.S. at 643-44.
[102] *Id.* at 637.
[103] *Id.* at 640.
[104] *Id.* at 643-44.

that he himself was not guilty of any crime whatsoever."[105] Rather, the relevant issue was whether the prosecutor's comments, "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[106]

Had the prosecutor's comments during closing arguments been of such a character as to infringe impermissibly on specific guarantees of the Bill of Rights, they may have resulted in a denial of due process.[107] For example, in *Miller v. Pate*,[108] the prosecution's description of paint stained shorts as blood stained shorts despite knowledge to the contrary was a violation of the Fourteenth Amendment, and thus was a denial of the defendant's due process.[109] In *Donnelly,* however, the prosecution's closing argument was opinion, not evidence, and did "not reach the same proportions [as *Miller*]"[110] and hence, was not so unfair as to result in a denial of due process.

While mischaracterization of evidence may result in unfair prejudice, use of the term *victim* by a defendant's own counsel does not rise to the level necessary to result in a denial of due process.[111] An appeals court in Ohio upheld the conviction of a defendant for two counts of rape though at trial his attorney referred to the victim as the *victim*.[112] The defendant's claim that his attorney's actions resulted in a denial of a fair trial were deemed "groundless and without merit."[113] While the appeals court did suggest courts "should refrain from using the term 'victim,'" it stated that the use of the term "by the court, prosecutor, and defense counsel" does not affect a defendant's substantial rights and therefore is not error.[114]

Reference to the victim as the *victim* by the government at trial is not a knowing mischaracterization of evidence and is not an assertion that defendant is guilty. The use of the term victim is akin to the use of the term defendant. Neither term implies the accused believes he is guilty. Rather, when the government or its witnesses refer to the victim as the *victim*, or the defendant as the *defendant*, it simply denotes their status at that point in the trial. Thus, under *Donnelly*, the government should not be precluded from making such reference to the victim at trial.

2. *Inflammatory Remarks*

Inflammatory remarks by the prosecution are not necessarily sufficient to establish a due process violation. In *Darden v. Wainwright*,[115] the Supreme Court held that though the prosecution referred to the defendant as an "animal" and argued that only the imposition of the death penalty would guarantee the defendant would not commit similar crimes in the future, the remark, while

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105 *Id.* at 644.
106 *Id.* at 643.
107 *Id.* at 643 & n.15.
108 386 U.S. 1 (1967).
109 *Id.* at 6-7.
110 *Donnelly*, 416 U.S. at 646.
111 *See* State v. Wright, 2003 Ohio App. LEXIS 3208, *4 (Ohio Ct. App. 2003).
112 *Id.*
113 *Id.* at *5.
114 *Id.*
115 477 U.S. 168 (1986).

inflammatory, "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused."[116]

Reference to the victim in a rape trial as the *victim* is not an inflammatory remark directed at the defendant. It is not an attempt to manipulate or misstate the nature of evidence. Again, such a reference merely reflects the status of the victim at that point in the trial. Furthermore, any effect the term victim may have on the jury pales in comparison to the effect of referring to the defendant as an "animal" that should be put to death to prevent future crimes. Thus, within the reasoning of *Darden*, use of the term victim should not be precluded.

C. *Defendant's Presumption of Innocence*

Another common argument of defense counsel, in a rape trial where the defendant asserts consent, is that reference to the victim as the *victim* is violative of the defendant's presumption of innocence. The presumption of innocence is an essential element of a fair criminal trial.[117] The government's requirement to prove its case beyond a reasonable doubt is derived from the principle of a defendant's presumption of innocence.[118]

However, the Due Process Clause of the Fourteenth Amendment does not mandate an instruction on the presumption of innocence.[119] Thus, a court's failure to provide such an instruction "does not in and of itself violate the Constitution."[120] Rather, to determine whether the defendant received a fair trial in accordance with the presumption of innocence the court must consider "the totality of the circumstances."[121] When making such a determination, jury instructions and arguments presented by both the prosecution and the defense are but two of the relevant factors that the court should take into consideration.[122]

The court may also consider whether the government proved its case beyond a reasonable doubt.[123] The burden of proving guilt beyond a reasonable doubt "provides concrete substance" to the presumption of innocence principle.[124] The purpose of the reasonable doubt standard is to reduce "the risk of convictions resting on factual error."[125]

The primary basis for the defense argument that reference to the victim as the *victim* violates the presumption of innocence is the assertion that the term *victim* implies that a crime has already occurred and thus creates a bias in the

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[116] *Id.* at 179-82.

[117] Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

[118] *In re* Winship, 397 U.S. 358, 362 (1970) *cited with approval in* United States v. Booker, 125 S. Ct. 738, 748 (2005).

[119] Kentucky v. Whorton, 441 U.S. 786, 789 (1979).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *In re* Winship, 397 U.S. at 362.

[124] *Id.* at 363.

[125] *Id.*

mind of the fact finder, relieving the government of its burden to prove its case beyond a reasonable doubt.[126]

If this assertion were accurate, the government would only have to point to the victim in the courtroom during its opening arguments and proclaim, "She is the victim of rape." Consequently, the government would be relieved of its burden to prove penetration and lack of consent beyond a reasonable doubt. The jury would infer from the proclamation of her status that it was in fact the defendant who perpetrated the crime against her, and there would be little left, in the way of evidence, to explore.

However, as already noted, courts should not lightly infer that the jury will assume the most damaging meaning when the government and its witnesses refer to the victim as the *victim*.[127] The government's burden, at a rape trial, is to prove beyond a reasonable doubt that a penetration occurred and that it occurred without the consent of the victim.[128] Thus, when charged, the court instructs the jury to consider all the *evidence* and determine whether the government proved those elements beyond a reasonable doubt.[129]

Under the totality of the circumstances,[130] it is unlikely that the prosecution's use of the term *victim* will create the risk of conviction based on factual error.[131] Because use of the term victim is insufficient to prove any element of rape beyond a reasonable doubt, the government is not relieved of its burden of proof through its use, and therefore, under *In re Winship*,[132] the presumption of innocence is not violated.

D. Improper Expression of Veracity or Guilt

Officers of the court must not express their personal belief as to the veracity of a witness or the guilt of the defendant. As the Supreme Court noted in *United States v. Young*,[133] "[t]he line separating acceptable from improper advocacy is not easily drawn . . . . Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence."[134] In *Young*, the Court, citing to the ABA Standards for Criminal Justice, the ABA Model Code of Professional Responsibility, and the ABA Model Rules of Professional Conduct, stated that it was unprofessional conduct for an officer of the court to present a personal opinion as to the falsity or veracity of any evidence or testi-

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[126] *See, e.g.*, Defense Motion, *Bryant* (No. 03 CR 204), *supra* note 72. The defense asserted that use of the term victim was calculated to create prejudice against the accused by implying the accuser was in fact raped and thus was a *victim*. *Id.*

[127] *See* Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

[128] *See supra* notes 24-29 and accompanying text.

[129] *See, e.g.*, CAL. JURY INSTRUCTION, CRIMINAL (CALJIC) 10.65 (7th ed. 2005) ("If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find [him] [her] not guilty of the crime.").

[130] Kentucky v. Whorton, 441 U.S. 786, 789 (1979).

[131] *See, e.g.*, State v. Nomura, 903 P.2d 718, 723 (Haw. Ct. App. 1995).

[132] 397 U.S. 358 (1970).

[133] 470 U.S. 1 (1985).

[134] *Id.* at 7.

mony, or as to the guilt or innocence of the defendant.[135] Such an expression may lead to unfair prejudice because the jury may be inclined to lend added weight to the opinion of the officer of the court, or the jury may believe the opinion is based on the officer's access to extra-judicial information.[136]

In this vein, another argument proffered by defense counsel in *People v. Bryant* was that any reference to the accuser as the victim would be an improper expression of a personal belief in the veracity of the victim or the guilt of the defendant.[137] This argument, once more, hinges on the assertion that the term victim implies lack of consent and that the prosecution's reference to the victim as the *victim* equates to a personal opinion, the expression of which denies the defendant the right to be judged solely on the basis of the evidence presented at trial. It also relies on the assumption that the allegations of female accusers in rape trials where consent is the defense should be considered suspect until final adjudication of the matter.

However, the term victim does not connote that the victim is more or less truthful. A person who alleges a crime was committed is, at the outset, deemed neither credible nor incredible. In general, victim-witnesses are afforded a presumption of credibility. For example, law enforcement personnel are authorized to make an arrest based on a citizen complaint without corroboration or investigation of truthfulness,[138] particularly when the individual reporting the incident is a victim-witness.[139]

When the victim-witness alleges a sexual assault has occurred, the presumption of credibility of the complaint and the witness is particularly important. The Tenth Circuit, in *Easton v. City of Boulder*,[140] stated that discounting the credibility of a sexual assault victim's testimony at the outset "would only serve to discourage [victims] from reporting [such] incidents and to unjustly insulate the perpetrator of such crimes from prosecution."[141]

However, the presumption of credibility for sexual assault victims, in particular rape victims, as noted *supra*, was not always the prevailing view.[142] As one scholar points out, "the singularity of the law of rape stems mainly from a deep distrust of the female accuser."[143] In fact, until 1975, California required that in all sexual assault cases the jury be instructed as follows:

> A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is inno-

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[135] *See id.* at 8-11.

[136] *See* United States v. Moore, 710 F.2d 157, 159 (4th Cir. 1983).

[137] Defense Motion, *Bryant* (No. 03 CR 204), *supra* note 72.

[138] *See, e.g.*, Guzell v. Hiller, 223 F.3d 518, 519-20 (7th Cir. 2000) ("Police are entitled to base an arrest on a citizen complaint, whether of a victim . . . or a nonvictim witness, without investigating the truthfulness of the complaint, unless . . . they have reason to believe it's fishy.").

[139] *See* 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.4(a) (3d ed. 1996) (noting that "by far the prevailing view" is that corroboration is not essential in victim-witness cases, and arguing "that when an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such may not be the case").

[140] 776 F.2d 1441 (10th Cir. 1985).

[141] *Id.* at 1449.

[142] *See supra* notes 38-46 and accompanying text.

[143] Berger, *supra* note 22, at 10.

> cent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.[144]

That instruction, given in *People v. Rincon-Pineda*, was coupled with evidence of the victim's sexual history proffered by the defense to show that the victim was of "unchaste character."[145] Evidence of the victim's "unchaste character" was presented to attack her veracity by asserting "a woman who has previously consented to sexual intercourse would be more likely to consent again."[146] In this respect, the defense argued that the credibility of such a woman should be considered in light of her unchaste activities[147] making the suggestion to the jury that a woman who consents to intercourse is not as credible as a woman who has never engaged in consensual sexual activities.

The California Supreme Court, however, found no evidence to suggest, "juries should be instructed that those who claim to be victims of sexual offenses are presumptively entitled to less credence than those who testify as the alleged victims of other crimes."[148] Instead, the court held that the veracity of the victim-witness should be considered in light of the "circumstances of the alleged crime" and the witness's demeanor and presentation of testimony at trial.[149]

In a rape trial, reference to the victim as the *victim* is not an improper expression of veracity or guilt. By making such a reference, the prosecution is not stating a personal belief that the victim-witness is veracious or that the defendant is guilty. Just as the defendant is afforded a presumption of innocence, the victim in a rape trial is afforded a presumption of credibility and it is the province of the jury to evaluate the sufficiency of that presumption.[150]

A court's instruction on the presumption of veracity of witness testimony does not deprive a defendant of his presumption of innocence, nor does it relieve the government of its burden to prove its case beyond a reasonable doubt.[151] However, the presumption of veracity is rebuttable.[152] Still, some courts, such as the court in *People v. Bryant*, have decided that this principle does not apply to female victims in rape trials.[153]

Efforts by courts to reach a middle ground by allowing use of the term *alleged victim* still undercut the presumption of veracity. The use of the word

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[144] People v. Rincon-Pineda, 538 P.2d 247, 252 (Cal. 1975).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 256.
[149] *Id.*
[150] *See* Donnelly v. DiChristoforo, 416 U.S. 637, 645 (1974).
[151] *Id.* at 645 (citing Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (holding that an instruction on the presumption of truthfulness, if accompanied by an instruction on the government's burden to prove its case beyond a reasonable doubt, sufficiently preserved the jury's function in assessing the credibility of witness testimony)).
[152] *See, e.g.*, Ballard v. Meyers, 572 S.E.2d 572, 576 (Ga. 2002) ("[T]he controlling presumption is that all witnesses speak the truth" but such a presumption may be rebutted with contradictory evidence). "Every witness is presumed to speak the truth. The presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest or motives, by contradictory evidence." United States v. Arias-Villanueva, 998 F.2d 1491, 1505 (9th Cir. 1993).
[153] *See* Order, *Bryant* (No. 03 CR 204), *supra* note 4.

alleged to modify victim conveys the same, or at best tempered, skepticism as complete preclusion of in-trial reference to the victim as the *victim*. The use of the term alleged qualifies the noun it modifies by implying the object is not, or may not be, what is asserted.[154] In this vein, one military court of appeals preferred the term *alleged* victim in a sexual assault case because "they're not victims until someone decides they're victims."[155] However, this implication of doubt by the court violates the presumption of veracity afforded to victim-witnesses.[156]

Generally, one cannot consent to be the victim of a crime. As a result, the accuser in any crime other than rape is generally not presumptively relegated to the status of alleged victim.[157] If, for instance, the accuser states that personal property is missing and that the defendant committed the theft, the accuser is considered a victim.[158] Upon conclusion of the trial, the jury will determine the guilt or innocence of the defendant, but the accuser's status as a victim is never called into question unless evidence to the contrary is presented.[159] Even the defense in *People v. Bryant* recognized this, admitting that "[i]n many criminal cases—for example, in most homicide cases—there is no dispute about whether a crime was committed or whether the alleged victim was, in fact, a 'victim.'"[160] However, the effect of the court's order, in *People v. Bryant*, to use the term *alleged* victim was to reinforce historical rape mythology—allegations of rape are easily made, hard to prove, and harder to defend against.[161]

This is not to say that the tension between the presumptions of credibility and innocence should not be preserved in an adversarial system such as ours. The prosecution cannot rightfully assert that the defendant's presumption of innocence violates the victim's presumption of credibility, though inherently it does. Conversely, the court cannot allow the defendant's presumption of innocence to supplant a victim-witness's presumption of veracity. The victim should not be forced to prove she is a victim because the defendant claims consent. To hold otherwise would allow the defendant to control the status of a victim-witness by virtue of the nature of his defense. The victim does not, and should not, carry the burden of proving her status beyond a reasonable doubt to earn the rights of a victim and a presumption of credibility. Rather, it is the

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[154] *See* Mittleman v. U. S. Treasury, 773 F. Supp. 442, 446 n2 (D.D.C. 1991) (use of "alleged" in the complaint qualified the facts); *In re* Caldwell, 1999 Ohio App. LEXIS 6351, *7 (Ohio Ct. App. Dec. 30, 1999) (court used the term "alleged father" when paternity was in doubt). *But see*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining alleged as "[a]sserted to be true as described").

[155] United States v. Underwood, 47 M.J. 805, 809 (A.F. Ct. Crim. App. 1997).

[156] *See supra* text notes 138-41 and accompanying text.

[157] *See generally* Estrich, *supra* note 18 (arguing that unlike crimes such as trespass or robbery, rape victims are shouldered with the burden of proving lack of consent or forced to overcome a presumption of diminished credibility).

[158] *Id.*

[159] For example, if the victim is shown to have remained in possession of the missing property, and to have never been deprived of possession of the property, the victim will cease to be considered a victim.

[160] Defense Motion, *Bryant* (No. 03 CR 204), *supra* note 72.

[161] Estrich, *supra* note 18, at 1094-95 (quoting Matthew Hale, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778)).

jury's role to determine which presumption will prevail once each side presents all the evidence.

E. Invasion of the Province of the Jury

It is the province of the jury to determine credibility[162] and evaluate the sufficiency of the evidence.[163] In *People v. Bryant*, the defense argued that reference to the victim as the *victim* invades the province of the jury by interfering with the jury's role in evaluating the evidence.[164] There the defense argued that the term victim was conclusive in nature, effecting a predetermination that a crime has in fact occurred.[165]

Once again, the argument relies heavily on the assertion that a jury will "draw meaning from the plethora of less damaging interpretations," an argument the Supreme Court has already rejected,[166] or that the term *victim* is so value laden that the jury will perceive the government's use of the term as a personal expression of the victim's veracity or the defendant's guilt. However, given that the conventional definition of the term *victim*, as well as the definitions included in victims' rights legislation,[167] are not so value laden, a court "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning."[168]

The jury is entrusted to assess credibility, weigh the sufficiency of the evidence, and determine whether a defendant will be deprived of life, liberty, or property.[169] If the jury can be entrusted with such a substantial responsibility, then, just as the jury is trusted to understand that the term *defendant* does not imply guilt, the jury should also be trusted to understand that the term *victim* does not imply veracity or lend credibility to the testimony.

The jury determines which facts have been proved beyond a reasonable doubt and applies those facts to the law.[170] It is unreasonable to infer that a jury would abandon the standard of beyond a reasonable doubt, and likewise the presumption of innocence, because it was somehow involuntarily swayed by the government's use of the word *victim* and lulled into using that impression as a basis for a guilty verdict.[171] A well-informed jury will likely understand that while a crime may have in fact occurred, reference to the victim as the *victim* does not make an innocent defendant culpable. To assert that the term *victim* would sway the jury is to assert that the jury cannot follow the charge of the court, the presumption of innocence, or the standard of beyond a reasonable doubt.

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[162] *See, e.g.*, Portuondo v. Agard, 529 U.S. 61, 79 (2000); Jackson v. Denno, 378 U.S. 368, 387 (1964).

[163] *See, e.g.*, Sparf v. United States, 156 U.S. 51, 79 (1895); Tracy v. Swartwout, 35 U.S. 80, 97 (1836); United States v. Broadie, 2004 U.S. App. LEXIS 24553 (4th Cir. 2004).

[164] Defense Motion, *Bryant* (No. 03 CR 204), *supra* note 72.

[165] *Id.*

[166] Donnelly v. DiChristoforo, 416 U.S. 637, 647 (1974).

[167] *See supra* text notes 83-86 and accompanying text.

[168] *Donnelly*, 416 U.S. at 647.

[169] *See supra* text notes 162-63 and accompanying text.

[170] *See* Sparf v. United States, 156 U.S. 51, 78-79 (1895).

[171] *See generally* State v. Nomura, 903 P.2d 718, 723 (Haw. Ct. App. 1995).

F. Less Prejudicial Reference

Various alternatives to the term victim have been suggested to prevent the alleged harm asserted by defense counsel in rape cases. The court in *People v. Bryant* rejected the defense request to refer to the accuser as the "complaining witness" or in the alternative the "complainant."[172] The court instead ordered that the parties refer to the accuser either as the "alleged victim" or by her proper name.[173] Furthermore, the jury instructions and special interrogatories would refer to the "alleged victim" as "person."[174]

The prosecution in *People v. Bryant* argued that use of any word other than victim would carry with it potential confusion and inaccuracy.[175] The rationale was that the use of the terms "accuser" or "complaining witness" violated the victim's constitutional and statutory right to be treated with fairness, respect, and dignity.[176] "Accuser," the government argued, is confusing, misleading, and legally inaccurate, while "complaining witness" can refer to the victim, the outcry witness, or the police officer who submitted reports.[177] However, in a rape case there is only one victim—one person who alleges a crime was committed against her.[178]

Two key harms arise from the court's decision in *People v. Bryant*. First, as noted *infra*, the term "alleged victim" is violative of the presumption of credibility afforded to victim-witnesses.[179] Use of the modifier—"alleged"—casts aspersions on the credibility of the accuser[180] and may cause the withdrawal of the victim, or future victims, from the criminal justice process.[181] In issuing its order, the court in *People v. Bryant* put the victim in a suspect class defined by the nature of the crime—rape—and the nature of the defense—consent.

Second, jurors generally unfamiliar with legal terminology[182] would arguably benefit from a consistent use of terms. The constant flux between proper name, "alleged victim," and "person" serves only to confuse the factfinder in a trial where the body of evidence is primarily testimonial. If the court determines "alleged victim" is the proper means of reference, then

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[172] Order, *Bryant* (No. 03 CR 204), *supra* note 4.

[173] *Id.*

[174] *Id.*; *see also supra* text accompanying notes 138-41.

[175] People's Response to Defendant's Brief to Preclude the Use of the Word Victim, *People v. Bryant* (Colo. Dist. Ct. 2004) (No. 03 CR 204), *available at* http://www.courts.state.co.us/exec/media/eagle/courtdocuments.htm.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *See supra* text accompanying notes 138-41.

[180] *See supra* text accompanying notes 154-61.

[181] *See supra* text accompanying notes 140-41; *see also* Anderson, *supra* note 73.

[182] *See, e.g.*, Perkins v. Komarnyckyj, 834 P.2d 1260, 1265 (Ariz. 1992) (While addressing the decision of a judge to correct a juror regarding the use of the term "jurist," the court stated "[j]urors are often unfamiliar with correct legal terminology . . . ."); Boyd v. State, 715 So. 2d 825, 842 (Ala. Crim. App. 1997) (noting the average juror "is unfamiliar with legal terms and concepts"); John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1236 (2002) (In arguing for reform of juror instructions Cronan notes that most instructions "contain legal terms that are foreign to most jurors.").

"alleged victim" should be used consistently at trial, with special interrogatories, and in jury instructions.

The final alternative is to refer to the victim by nature of her allegations; however, this is likely the most prejudicial method. Presumably, any defendant would prefer *victim* to "the woman who accuses the defendant of forcibly penetrating her without her consent." When considering the use of more prejudicial terms, such as "the killer" or "butcher," one court noted that use of the term *victim* was quite mild in comparison.[183]

On balance, the most reasonable term to use is *victim.* It does not invade the defendant's presumption of innocence, but preserves the victim-witness's presumption of veracity. It avoids the potential confusion that will likely arise when a multitude of terms are used and accurately describes the appropriate party in a way that "complaining witness" and "accuser" does not. Furthermore, use of the term *victim* is not *unfairly* prejudicial, does not result in a denial of due process, and is preferable to the available options, and therefore its use should not be precluded at trial.

As a final measure of amelioration, the court, in accordance with Federal Rule of Evidence 105,[184] may provide a jury instruction regarding the use of the term victim by the prosecution and its witnesses. A sample limiting instruction may read as follows:

> Throughout the trial, the prosecution and its witnesses may periodically refer to [proper name of victim] as the victim. Such reference should not be taken as an endorsement of the witness's veracity or defendant's guilt. The use of the term victim does not relieve the prosecution of its burden to prove the elements of the crime beyond a reasonable doubt. Rather, the use of the term victim is a means of eliminating multiple and confusing methods of reference to [proper name of victim] in this case. It is the province of the jury to judge the believability of a witness and determine the weight to be given to the testimony. In doing so, the jury should consider any evidence presented which may have a reasonable tendency to prove or disprove the truthfulness of the witness.

Such an instruction would address the many concerns raised by defense counsel while preserving the integrity of victim-witnesses and reducing the potential for confusion.

IV. CONCLUSION

The court's ruling in *People v. Bryant* illustrates the necessity to institute a fair and consistent means of referring to the victim of rape at trial. The negative impact of the decision may adversely affect the willingness of rape victims

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[183] Anderson v. Texas, 2001 Tex. App. LEXIS 3892, *11-12 (Tex. App. June 14, 2001). The court compared use of the term *victim* to decisions which deemed terms such as "slaughter," "killer," "sex slave," and "butcher," not improper. *Id.* at 12. Furthermore, the court stated that while the defense "could have requested use of the term 'alleged victim' . . . it is unlikely he would have succeeded or that this would have had a different effect on the jury." *Id.*

[184] FED. R. EVID. 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

to come forward or be involved in the prosecution of their cases, particularly when there is no overt evidence of physical trauma and the defendant argues the penetration was consensual.

While many arguments are made by defense counsel regarding the negative effect the use of the term *victim* has on a defendant's right to a fair trial and his presumption of innocence, those arguments lack adequate foundation or support. Reference to the victim as the *victim* is not inflammatory or unfairly prejudicial and is not an improper expression of veracity or guilt. Furthermore, such reference does not invade the province of the jury. Rather, reference to the victim of rape as the *victim* safeguards the defendant's presumption of innocence while preserving the victim-witness's presumption of credibility. The preservation of this presumption is proper given the jury's role is assessing credibility and the lingering social acceptance of many rape myths that taint jury deliberations in these cases.

If a court deems that some form of unfair prejudice will result from such reference, a limiting instruction would provide an adequate remedy. However, while "alleged victim" may also provide a viable alternative, the term fails to recognize adequately the status of the victim and instead portrays a presumption of incredibility. Ultimately, the court will have to determine whether it will reinforce the inequality inherent in rape prosecution or preserve the validity of the complaint until controverted. Whichever path the court chooses, it must, at a minimum, apply its order consistently to avoid juror confusion.