THE EMPIRICAL, HISTORICAL AND LEGAL CASE AGAINST THE CAUTIONARY INSTRUCTION: A CALL FOR LEGISLATIVE REFORM

Rape is a physical and mental ordeal, which the victim must struggle to overcome on many levels.[1] The physical attack is only the beginning of the victim's tribulations. Prosecution of the defendant exposes the victim to a process almost as frightening as the actual attack.[2] Under these circumstances, the cautionary instruction typically given by the judge to the jury at the end of a rape trial needlessly exacerbates the victim's plight by casting doubt on the veracity of her testimony.[3]

The cautionary instruction is a relic dating back to Lord Chief Justice Matthew Hale in the seventeenth century. After gradually entering English common law, it was exported to America.[4] Though the wording varies substantially from state to state,[5] most cautionary instructions contain three common elements. These are: (1) rape is a charge that is

1. *See* S. ESTRICH, REAL RAPE 1-2 (1987) (personal account of a rape and subsequent events); T. MCCAHILL, L. MEYER & A. FISCHMAN, THE AFTERMATH OF RAPE 23-38 (1979) (Typical problems after rape include changed eating habits, disrupted sleep patterns, reeurring nightmares, fear of being alone on the street or at home, decreased social activity, scorn from family and friends, increased fear of both known and unknown men, worsening sexual relations, alienation from boyfriend or spouse and self-hatred.).

2. *See* L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 221-36 (1978) (The courtroom is an upsetting experience for many rape victims due to the blame-the-victim strategy of the defense, the confrontation between the victim and the defendant, the public setting of the trial, the predominance of males in the courtroom and on the jury and the formality of the courtroom.).

3. *See* S. BROWNMILLER, AGAINST OUR WILL 369-70 (1975) (The cautionary instruction reflects society's belief that rape complainants often lie.); *cf.* A. MEDEA & K. THOMPSON, AGAINST RAPE 111-12 (1974) (Societal view of female's chastity and fidelity as male property is reflected in legal system.).

4. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 873-75, 538 P.2d 247, 254-55, 123 Cal. Rptr. 119, 126-27 (1975) (The cautionary instruction originated from Lord Hale's writings and was introduced into the U.S. in California in the mid-nineteenth century.); Geis, *Lord Hale, Witches, and Rape,* 5 BRIT. J.L. & SOC'Y 26, 42 (1978) (Hale's instruction has become " 'one of the most oft-quoted passages in our [American] jurisprudence.' " (quoting United States v. Wiley, 492 F.2d 547, 554 (D.C. Cir. 1973))).

5. *Compare* State v. Smoot, 99 Idaho 855, 863, 590 P.2d 1001, 1009 (1978) ("A charge such as that made against the defendant in this case is one, which, generally speaking, is easily made, but difficult to disprove even though the defendant is innocent. Therefore, I charge you the law requires that you examine the testimony of [the victim] with caution.") *with* Williams v. State, 254 Ark. 940, 943, 497 S.W.2d 11, 13 (1973) ("You are instructed that the crime of second degree rape, of which [defendant] is charged, is a serious one, and such a charge is easily made and hard to contradict or disprove; that it is a character of crime that tends to create a prejudice against the person charged;

easily made by the victim, (2) rape is a charge that is difficult for the defendant to disprove, and (3) the testimony of the victim requires more careful scrutiny by the jury than the testimony of the other witnesses in the trial.[6]

This note questions the empirical validity of the three elements of the cautionary instruction.[7] The note acknowledges that the cautionary instruction is frequently given at rape trials in the United States;[8] illustrates the context in which Hale used the cautionary instruction and considers why this context is no longer appropriate;[9] examines the various legal problems with the cautionary instruction;[10] and concludes that the cautionary instruction serves no valid purpose and therefore should be abolished. The note ends with a legislative model to eliminate the cautionary instruction.[11]

I. THE PREVALENCE OF THE CAUTIONARY INSTRUTION

The cautionary instruction has been prohibited through legislative enactment in five states.[12] Other states have prohibited it by judicial decree,[13] while a few simply do not use the instruction in practice.[14] In

---

and, for these reasons, it is your duty to weigh the testimony carefully, and then determine the truth with deliberative judgment, uninfluenced by the nature of the charge.").

6. *See, e.g., Smoot,* 99 Idaho at 863, 590 P.2d at 1009; *see also* United States v. Merrival, 600 F.2d 717, 719 (8th Cir. 1979) ("A charge such as that made against the defendants in this case is one which, generally speaking, is easily made and once made is difficult to disprove, even if the defendants are innocent. From the nature of a case such as this, the complaining witness may be the only witness testifying directly as to the alleged act constituting the crime. Therefore, the law requires that you examine the testimony of the prosecuting witness with caution and consider and weigh it in light of all the circumstances shown. In giving this instruction, the Court does not mean to imply an opinion as to the credibility of any witness or the weight to be given his or her testimony.").

7. *See infra* notes 21-110 and accompanying text.

8. *See infra* notes 12-20 and accompanying text.

9. *See infra* notes 111-19 and accompanying text.

10. *See infra* notes 120-38 and accompanying text.

11. *See infra* notes 139-45 and accompanying text.

12. *See* COLO. REV. STAT. § 18-3-408 (1986) (prohibiting all three elements); MINN. STAT. ANN. § 609.347(5)(c)-(d) (West 1987) (same); NEV. REV. STAT. ANN. § 175.186(2) (Michie 1986) (prohibiting instruction that rape accusation is easy to make); 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1983) (prohibiting special scrutiny of victim's testimony); S.D. CODIFIED LAWS ANN. § 23A-22-15.1 (1979) (prohibiting singling out of victim's testimony).

13. By judicial decree, the cautionary instruction has been either banned or so discredited that it is no longer used in 17 states and the District of Columbia. These jurisdictions include Alaska (Burke v. State, 624 P.2d 1240, 1254-55 (Alaska 1980)), Arizona (State v. Settle, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975)), California (People v. Rincon-Pineda, 14 Cal. 3d 864, 882-83, 538 P.2d 247, 260, 123 Cal. Rptr. 119, 132 (1975)), District of Columbia (Campbell v. United States, 176 F.2d 45, 46 (D.C. Cir. 1949)), Florida (Marr v. State, 494 So. 2d 1139, 1140 (Fla. 1986)), Georgia (Black v. State, 119 Ga. 746, 749, 47 S.E. 370, 371-72 (1904)), Idaho (State v. Smoot, 99 Idaho 855, 863, 590 P.2d 1001, 1009 (1978)), Indiana (Taylor v. State, 257 Ind. 664, 666-69, 278 N.E.2d 273, 274-76 (1972)), Iowa (State v. Feddersen, 230 N.W.2d 510, 514-15 (Iowa 1975)), Louisiana (State v. Selman, 300 So. 2d 467, 470 (La. 1974), *vacated in part,* 428 U.S. 906 (1976)), Missouri (State v. Davis,

California the instruction of Lord Hale was mandatory until 1975,[15] when the State Supreme Court abolished it in *People v. Rincon-Pineda.*[16] While a number of states followed California's lead immediately after *Rincon-Pineda,*[17] since 1980 only three states have eliminated the cautionary instruction.[18]

In spite of its abandonment in some states, over half of the states allow the cautionary instruction to be issued at the conclusion of a rape trial. These states use the cautionary instruction for a variety of purposes.[19] It is most commonly used when there is no witness to corrobo-

---

190 S.W. 297, 298 (Mo. 1916)), Montana (State v. Liddell, 685 P.2d 918, 922 (Mont. 1984)), North Dakota (State v. Gross, 351 N.W.2d 428, 434 (N.D. 1984); State v. Young, 55 N.D. 194, 201-03, 212 N.W. 857, 860-61 (1927)), Ohio (State v. Tuttle, 67 Ohio St. 440, 445-46, 66 N.E. 524, 525-26 (1903) (statutory rape)), Oregon (State v. Bashaw, 296 Or. 50, 52-55, 672 P.2d 48, 48-50 (1983); State v. Stocker, 11 Or. App. 617, 619-20, 503 P.2d 501, 502 (1972)), Virginia (Crump v. Commonwealth, 98 Va. 833, 836, 23 S.E. 760, 761 (1895)), Washington (State v. Mellis, 2 Wash. App. 859, 862, 470 P.2d 558, 560 (1970)), and Wyoming (Story v. State, 721 P.2d 1020, 1044-46 (Wyo. 1986)).

14. *See* Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult,* 10 SW. U.L. REV. 585, 614-15 (1978) (Although the cautionary instruction is not legislatively or judicially prohibited in New York, North Carolina, or Tennessee, the courts of those states do not give the instruction in practice.).

15. CALIFORNIA JURY INSTRUCTION, CRIMINAL 10.22 (3d rev. ed. 1970); *see* People v. Nye, 38 Cal. 2d 34, 40, 237 P.2d 1, 4 (1951) (cautionary instruction mandatory).

16. People v. Rincon-Pineda, 14 Cal. 3d 864, 882-83, 538 P.2d 247, 260, 123 Cal. Rptr. 119, 132 (1975). Chief Justice Wright argued that the cautionary instruction "performs no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants." *Id.*

17. These states include Arizona (State v. Settle, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975) (cautionary instruction prohibited as an unwarranted personal opinion of the judge)) and Iowa (State v. Feddersen, 230 N.W.2d 510, 515 (Iowa 1975) (cautionary instruction is "discredited anachronism" and as such is eliminated)).

18. The only states that have discarded the cautionary instruction after 1980 are Florida (Marr v. State, 494 So. 2d 1139, 1140 (Fla. 1986)), Montana (State v. Liddell, 685 P.2d 918, 922 (Mont. 1984)), and Wyoming (Story v. State, 721 P.2d 1020, 1046 (Wyo. 1986)).

19. *See, e.g.,* Alabama (Barnett v. State, 83 Ala. 40, 45-46, 3 So. 612, 615 (1887) (cautionary instruction used to emphasize how careful a jury must be to convict a man for rape based on uncorroborated testimony)), Illinois (People v. Appleby, 104 Ill. App. 2d 207, 212, 244 N.E.2d 395, 398 (1968) (Strict appellate scrutiny is kept as a requirement in rape trials partly because of the acceptance of the three premises of the cautionary instruction.)), Kentucky (Holland v. Commonwealth, 272 S.W.2d 458, 459-60 (Ky. 1954) (The cautionary instruction justifies strict appellate scrutiny, i.e., taking "great care" in reviewing the trial court's verdict.)), Michigan (People v. Jordan, 23 Mich. App. 375, 384-85, 178 N.W.2d 659, 663 (1970) (In "jurisdictions where the evidence is exceptionally close," the failure to give a cautionary instruction upon request justifies reversal.)), Nebraska (Arabian, *supra* note 14, at 597 (1978) (cautionary instruction given at end of all rape trials, but wording left to judge's discretion); *see also* Nebraska (State v. Vicars, 207 Neb. 325, 335, 299 N.W.2d 421, 428 (1980) (example of the discretionary wording of the cautionary instruction)), Vermont (State v. Wilkins, 66 Vt. 1, 16-17, 28 A. 323, 327-28 (1893) (jury must be cautious before convicting in rape trial)), and West Virginia (State v. Jenkins, 346 S.E.2d 802, 805-06 (W. Va. 1986) (cautionary instruction mandatory both when requested and when victim's testimony is not corroborated by other witnesses)).

rate the victim's testimony,[20] which is the case in an overwhelming majority of rape trials.

II. THE EMPIRICAL VALIDITY OF THE THREE ELEMENTS OF THE CAUTIONARY INSTRUCTION

A. *Rape is* Not *a Charge That is Easy to Make.*

The first element of the cautionary instruction is that rape is a charge which is easily made. Although this view is commonplace, there is simply no supporting data.[21]

Rape is the most underreported of the violent crimes.[22] Between 50 percent and 90 percent of all rapes are not reported to the police.[23] These figures indicate a large number of "hidden rapes."[24] Despite a number of recent reforms in the rape laws, such as rape-shield statutes,[25]

---

20. A cautionary instruction will often be issued in uncorroborated rape cases when the presiding judge perceives that the female victim is lying. *See* Arkansas (Beasley v. State, 258 Ark. 84, 90, 522 S.W.2d 365, 368 (1975); Williams v. State, 254 Ark. 940, 943, 497 S.W.2d 11, 14 (1973)), Connecticut (State v. Brauneis, 84 Conn. 222, 227-28, 79 A. 70, 73 (1911)), Delaware (Thompson v. State, 399 A.2d 194, 197-98 (Del. 1979); Wilson v. State, 49 Del. 37, 58-59, 109 A.2d 381, 392-93 (1954), *cert. denied,* 348 U.S. 983 (1955)), Hawaii (State v. Jones, 62 Haw. 572, 581-82, 617 P.2d 1214, 1221 (1980); State v. Dizon, 47 Haw. 444, 462-65, 390 P.2d 759, 770-71 (1964)), Kansas (State v. Loomer, 105 Kan. 410, 412-13, 184 P. 723, 724 (1919)), Maine (State v. McFarland, 369 A.2d 227, 230 (Me. 1977)), Maryland (Rhoades v. State, 56 Md. App. 601, 608, 468 A.2d 650, 653 (1983)), Massachusetts (Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 268-69, 392 N.E.2d 1213, 1218-19 (1979)), Mississippi (Watkins v. State, 134 Miss. 211, 216-17, 98 So. 537, 538-39 (1923)), New Hampshire (State v. Blake, 113 N.H. 115, 123, 305 A.2d 300, 305-06 (1973)), New Mexico (State v. Dodson, 67 N.M. 146, 147-48, 353 P.2d 364, 365-66 (1960); State v. Clevenger, 27 N.M. 466, 471-72, 202 P. 687, 689-90 (1921)), Oklahoma (Maxwell v. State, 78 Okla. Crim. 328, 340-43, 148 P.2d 214, 219-20 (1944)), Texas (Hamilton v. State, 41 Tex. Crim. 599, 602, 58 S.W. 93, 95 (1900)), Utah (State v. Studham, 572 P.2d 700, 702 (Utah 1977); State v. Reddish, 550 P.2d 728, 729 (Utah 1976)), and Wisconsin (Connors v. State, 47 Wis. 523, 526-28, 2 N.W. 1143, 1146-47 (1879)).

21. *See generally* Galvin & Polk, *Attrition in Case Processing: Is Rape Unique?,* 20 J. RES. CRIME & DELINQ. 126, 127-31 (1983) (Studies show rape is reported less than any other violent crime.); LeGrande, *Rape and Rape Laws: Sexism in Society and Law,* 61 CALIF. L. REV. 919, 920-22 (1973) (Studies confirm that most rapes are not reported to the police.).

22. *See* Note, *The Victim in a Forcible Rape Case: A Feminist View,* 11 AM. CRIM. L. REV. 335, 347-49 (1973) (According to some estimates, less than five percent of all rapes are reported, making rape the least reported crime in the Uniform Crime Reports.).

23. E. HILBERMAN, THE RAPE VICTIM 9 (1976); Check & Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape,* 8 INT'L J. WOMEN'S STUD. 414, 415-16 (1985); Koss, *The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics,* 9 PSYCHOLOGY WOMEN Q. 193, 194-95 (1985).

24. *See* Koss, *supra* note 23, at 195.

25. *See* FED. R. EVID. 412(a) ("Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible."); Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade,* 70 MINN. L. REV. 763, 765 (1986) (Rape-shield statutes "reversed the long-standing common-law

the reporting rate remains low.[26]

Many factors contribute to this low reporting rate: insensitive and prejudicial police attitudes about rape,[27] the guilt women place on themselves,[28] the harsh attitude of district attorneys toward victims,[29] the humiliating publicity of a rape trial,[30] the stigma attached to a woman charging that a sexual offense has been committed against her,[31] and especially a victim's inevitable ordeal at trial.[32]

Even if a rape is reported, the charges may later be dropped: a study in Denver found that 38% of rape victims drop their charges soon after filing them.[33] Nor does the reporting of a rape always result in an arrest; in fact, according to a Philadelphia study, the arrest rate in rape cases is only 57.7%[34]—which means almost half of the reported rape assailants are not apprehended by the police. Even after arrest, a trial is not assured. The preliminary hearing often frightens the victim into dropping

---

doctrine that permitted a defendant accused of rape to inquire into the complainant's 'character for unchastity.' ").

26. Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings,* 70 VA. L. REV. 1657, 1657-59 (1984); *see also* J. MARSH, A. GEIST & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM 26-28 (1982) (A study done after passage of a sweeping rape reform law in Michigan indicates "rape law reform . . . does not seem to contribute to reporting trends."); Polk, *Rape Reform and Criminal Justice Processing,* 31 CRIME & DELINQ. 191, 202-03 (1985) (In California, rape reform has not increased the flow of rape cases into court.).

27. *See* S. BROWNMILLER, *supra* note 3, at 364-65 (One police officer characterized rape victims as "[p]rostitutes who didn't get their money."); LeDoux & Hazelwood, *Police Attitudes and Beliefs Toward Rape,* 13 J. POLICE SCI. & ADMIN. 211, 219 (small group of police officers are insensitive to rape victims).

28. *See* Steward, Hughes, Frank, Anderson, Kendall & West, *The Aftermath of Rape,* 175 J. NERVOUS & MENTAL DISEASE 90, 93 (1987) (Women who do not struggle during rape or who are raped by an acquaintance are likely to feel guilty and often blame themselves for the incident.).

29. *See* L. HOLMSTROM & A. BURGESS, *supra* note 2, at 133-48 (District attorneys ask frank questions that show they doubt victim's story.).

30. Note, *The Rape Corroboration Requirement: Repeal Not Reform,* 81 YALE L.J. 1365, 1374 (1972).

31. *Id.*

32. *See supra* note 2; *see also* S. ESTRICH, *supra* note 1, at 58-71 (Modern law of force, which often requires a victim to physically resist her attacker in order to show a lack of consent, reflects court's distrust of the victim.); C. HURSCH, THE TROUBLE WITH RAPE 163 (1977) (criminal justice system outmoded in the way it treats rape victims); T. MCCAHILL, L. MEYER & A. FISCHMAN, *supra* note 1, at 211-26 (victim often traumatized by ordeal of rape trial); Landau, *Rape: The Victim as Defendant,* 10 TRIAL, July-Aug. 1974, at 19-22 (victim rather than defendant placed on trial); Resick, *The Trauma of Rape and the Criminal Justice System,* 9 JUST. SYS. J. 52, 57-58 (1984) (Appearance in court by a victim is a terrifying experience due to the presence of the attacker and the reliving of the incident and, as a result, the victim often suffers depression after the trial.).

33. C. HURSCH, *supra* note 32, at 110-14 (reasons to drop rape charges include fear of trial, intimidation by friends of attacker and police resistance about prosecuting the case).

34. *See* T. MCCAHILL, L. MEYER & A. FISCHMAN, *supra* note 1, at 124-25.

her charges.[35] And even if the victim is willing to go to trial, the prosecutor will often refuse to proceed because—in the prosecutor's judgment—the victim does not have a perfect case.[36]

Once a rape victim succeeds in bringing her assailant to trial, she still faces a daunting process. Rape trials have been described as a "second assault" on the victim.[37] *The Aftermath of Rape* best describes the ordeal of a complainant during and after the trial:

> [The rape] trial meets all . . . conditions of successful degradation ceremonies. She [the victim] must testify (he [the defendant] need not) and thereby be confronted and transformed into something viewed as inferior in the local scheme of social types . . . . Indeed, it is before many witnesses that the victim is denounced and her motives questioned . . . . Fears and emotional turmoil that may have subsided earlier are once again aroused . . . . It is not surprising, therefore, to find that it is in the areas of nightmares, heterosexual relationships, and social activities that adjustment difficulties are likely to develop for the victim who has been to trial.[38]

Even if the victim is willing to subject herself to the terrors of a rape trial, she must still face the fact that *winning* such a trial is an extremely arduous process.[39] Aside from the emotional trauma, the victim must overcome several legal obstacles, such as proving she did not consent[40] and proving she was forced into intercourse.[41]

In short, a charge of rape is *not* easily made: it is in fact a difficult accusation to make and a traumatic charge to carry through to trial. The sheer number of charges made that do not result in a trial suggests that only the most adamant of victims—and the strongest of cases—will survive. Considering the ordeals a victim must go through to reach trial,

---

35. *Id.* at 170-71 (Over 15% of all rape charges are dismissed because the victim is terrified of facing her attacker and recounting her story before strangers.).

36. *See* S. ESTRICH, *supra* note 1, at 17-18. Prosecutors do not have to reveal the reasons for their dismissal of rape complaints. They are likely to dismiss a rape complaint that is not absolutely convincing, e.g., the victim and the defendant know each other or the victim is not physically harmed or there is little corroborating evidence to support the victim's story. *Id.* at 17-19.

37. J. WILLIAMS & K. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 146-69 (1981). The second assault stems from "the coming together of both historical and contemporary attitudes about men and women, their relationships and their 'appropriate' behavior" both in and out of the courtroom. *Id.* at xi-xiii; *cf.* C. DEAN & M. DE BRUYN-KOPS, THE CRIME AND THE CONSEQUENCES OF RAPE 88 (1982) (treatment of victim by criminal process has been likened to being "raped again").

38. T. MCCAHILL, L. MEYER & A. FISCHMAN, *supra* note 1, at 224-25.

39. *See* L. HOLMSTROM & A. BURGESS, *supra* note 2, at 121-56.

40. N. GAGER & C. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 139-42 (1976) (There is "no other crime in which consent figures in the law as an issue.").

41. *See, e.g.*, State v. Alston, 310 N.C. 399, 403, 312 S.E.2d 470, 472-73 (1984) (Sufficient force was not present for a rape charge when the assailant threatened the victim with violence, pushed her legs apart, made her cry, and penetrated her.).

there is no justification for instructing the jury that rape is an easy accusation to make.

B. *A Rape Charge is* Not *Difficult to Disprove.*

The second element of the instruction is a caution that rape is a difficult charge for the defendant to disprove. Supporters of the cautionary instruction argue that without an added note of caution the defendant would be left at the mercy of a jury eager to convict despite innocence.[42]

This assumption is also of questionable validity. Far from being a difficult crime to defend, the conviction rates indicate that rape is the easiest accusation of violent crime to disprove.[43] Only 2 percent to 15 percent of the actual cases of rape ever reach the trial stage.[44] Even in cases that do go to trial, a conviction is unlikely.[45] Two factors make the charge of rape easier to disprove than other violent felonies: first, the victim is a convenient target for the focus of the trial; second, the jury is often reluctant to weigh the evidence impartially.

Unlike trials for other violent crimes, the focus in the rape trial is usually on the victim rather than on the defendant.[46] The main reason for this focus is the lack of witnesses to corroborate a woman's charge of rape.[47] As one commentator noted, "oath against oath at all times

---

42. *See, e.g.,* Ploscowe, *Sex Offenses: The American Legal Context,* 1960 LAW & CONTEMP. PROBS. 217, 222-23 (requirement of corroboration by other material evidence needed to offset the jurors' indignation about the "railroading" of innocent men); Note, *Corroborating Charges of Rape,* 67 COLUM. L. REV. 1137, 1138-39 (1967) (safeguards needed to protect defendant in rape case from jury's outrage).

43. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 879-80, 538 P.2d 247, 257-58, 123 Cal. Rptr. 119, 129-30 (1975) (Rape is at the bottom of the FBI's successful prosecution list.); H. FEILD & L. BIENEN, JURORS AND RAPE 99 (1980) (The percentage of criminal charges ending in acquittal or dismissal is greater for rape (46%) than for murder (32%), aggravated assault (41%) and armed robbery (36%). The probability of committing a crime and not being arrested, prosecuted and found guilty of the offense is greater for rape (96%) than for murder (72%), aggravated assault (86%) and armed robbery (95%).); A. MEDEA & K. THOMPSON, *supra* note 3, at 113 (Only a small minority of defendants charged with rape are convicted.); Polk, *supra* note 26, at 191-92 (little threat of conviction for rapists).

44. Polk, *supra* note 26, at 203.

45. *See* T. MCCAHILL, L. MEYER & A. FISCHMAN, *supra* note 1, at 228 (A study done in Philadelphia indicates that out of 1198 reported rapes only 158 resulted in a guilty disposition.).

46. *See* C. DEAN & M. DE BRUYN-KOPS, *supra* note 37, at 86 (At rape trials, victims are treated worse than defendants.); Landau, *supra* note 32, at 19-22 (The victim is the primary focus of the rape trial.); Note, *supra* note 26, at 1661-63 (The focus in a rape trial is on the victim's behavior and reputation rather than on the defendant.).

47. S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 198-99 (1979) (study done of rapes in District of Columbia found witnesses were present in only 9% of the cases); *cf.* Estrich, *Rape,* 95 YALE L.J. 1087, 1098 (1986) (speculating that the American practice of abandoning inquiry into the defendant's state of mind makes the rape trial

means the word of a woman against the word of a man."[48] As a result, an effective strategy of defense attorneys is to blame the victim and thereby destroy her credibility.[49]

This shifting of focus is accomplished through a lengthy and often explicit cross-examination of the victim.[50] Typical subjects examined include the resistance of the victim to her attacker, their past relationship, the victim's sexual history and character, her emotional state, and the promptness with which she reported the rape.[51] As a result, the jury may base its decision on the character of the victim rather than on the guilt or innocence of the defendant.[52] If the victim dresses seductively or goes hitchhiking alone, the defendant may be acquitted regardless of the legal evidence.[53]

In an attempt to counteract the skewed focus of rape trials, some states have enacted safeguards to protect the victim and shift the focus of the jury away from her past.[54] These well-intentioned laws symbolically help to lessen the victim's ordeal; practically, however, such reform has not decreased the difficulty of proving a rape charge.[55]

The selective biases of the jury may also make the charge of rape easier to disprove. A selective bias may result from factors such as the socioeconomic status, race, or respectability of either the victim or the defendant.[56] Thus, a jury is often reluctant to convict a male defendant—blaming the victim instead for putting herself in a precarious situa-

---

"not . . . an inquiry into the guilt of the defendant (is he a rapist?) but of the victim (was she really raped? did she consent?)").

48. S. BROWNMILLER, *supra* note 3, at 369.

49. *See* L. HOLMSTROM & A. BURGESS, *supra* note 2, at 212-13 (focusing attention on victim is devastatingly effective).

50. *See id.* at 207-12 (typical cross-examination strategies include baiting the victim, monotony and rapid-fire attack).

51. *Id.* at 171-93.

52. H. FEILD & L. BIENEN, *supra* note 43, at 117-19 (Besides the defendant's race, the major factors in the jury's decision of guilt or innocence are the victim's race, physical attractiveness and sexual experience.).

53. *See* S. BESSMER, THE LAWS OF RAPE 150-53 (1984) (Although not legally relevant, the contributory negligence of the victim, e.g., being a prostitute or going to a bar alone, influences the jury's verdict, especially in cases without extrinsic violence.); *see also infra* notes 70-72 and accompanying text.

54. *See* Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study,* 55 WASH. L. REV. 543, 562-63 (1980).

55. *Cf.* Note, *supra* note 26, at 1664-66 (There is no tangible evidence indicating that the contribution of the rape reform movement, as evidenced by rape-shield laws, has eased the lot of the victim during a rape trial; the reform movement does have symbolic significance.).

56. Thornton, *Effect of Rape Victim's Attractiveness in a Jury Simulation,* 3 PSPB 666, 666 (1977) (Studies indicate socioeconomic status, race and respectability of either victim or defendant biases the jury.).

tion.[57] For example, many jurors have false preconceptions, such as "women falsely accuse innocent men of rape, [and] women provoke rape by their physical appearance."[58] Rape trials are also often held before male-dominated juries[59] reluctant to find another man guilty of rape without aggravating circumstances, such as the presence of a gun or physical violence.[60] Even when female jurors are part of the rape proceedings, this pattern of selective bias does not change.[61] Many women jurors cannot empathize and in fact have harsh views of rape victims with "bad reputations."[62] Finally, many jurors still cling to the notion of "women's rape fantasies," which maintains that women enjoy being raped.[63]

Two independent studies confirm this selective bias. Thomas McCahill, Linda Meyer and Arthur Fischman extensively studied rape in the Philadelphia area.[64] They compared bench trials to jury trials: convictions were obtained in 51.1% of the bench trials, compared with only 44% for the jury trials.[65] Another study, by Harry Kalven and Hans Zeisel,[66] who also compared bench and jury trials, found even more remarkable results. In aggravated rape cases with evidence of physical violence, the jury acquitted in 12% of the cases in which the judge would have convicted. In simple rape cases, the figure jumped to 60%. The authors termed these results "startling."[67] No contradictory studies exist, for the simple reason that there is "no data to support the view that

57. Gaicopassi & Wilkinson, *Rape and the Devalued Victim*, 9 LAW & HUM. BEHAV. 367, 369-70 (1985) (Absent violence, rape juries often assume "the victim placed herself in a hazardous situation and should take the blame for the consequences.").

58. H. FEILD & L. BIENEN, *supra* note 43, at 47. One especially egregious example is the case of a nineteen-year-old secretary attacked in a Los Angeles county parking lot. A witness made a positive identification of the assailant and the district attorney believed the case of rape was strong. The jury rendered a verdict of not guilty. One juror explained that it was too difficult to believe that anyone could possibly want to rape such a plain female. *Id.*

59. *See* Note, *supra* note 22, at 344 (Women are often asked to be excused from rape trials due to a perceived lack of objectivity.).

60. Note, *supra* note 30, at 1379-80.

61. *See* Note, *supra* note 22, at 344. *But see* Thornton, *supra* note 56, at 669 (Female jurors are more likely to render a guilty verdict in a rape trial than their male counterparts but are less severe in their assessment of punishment.).

62. Note, *supra* note 22, at 344 (Female jurors are just as harsh as male jurors on rape victims with poor reputations because they cannot empathize with them.).

63. *See* S. ESTRICH, *supra* note 1, at 5 (The women's rape fantasy holds that women "desire to be forcibly ravished.").

64. T. MCCAHILL, L. MEYER & A. FISCHMAN, *supra* note 1, at 7-20 (explaining methodology and goals of the authors' Philadelphia study of rape victims).

65. *Id.* at 195-96.

66. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 33-54 (1966) (explaining sample and research design the authors used in reaching their conclusions).

67. *Id.* at 253.

juries are prejudiced in favor of rape victims."[68]

One feature of jurors' selective bias is the frequency with which the statutory law is ignored. Once intercourse and force are established in a rape case the only major issue left is consent.[69] There is a growing body of literature, however, which suggests that a jury will make up special extra-legal defenses to acquit the defendant.[70] The most important of these is the assumption of risk defense.[71] Hubert Feild and Leigh Bienen explain that "[w]hen the jurors perceive that the woman has precipitated or encouraged the assault by her appearance or behavior, they are likely to apply the 'assumption of risk' criterion."[72]

Thus, a female is unlikely to prevail in a rape trial if, in the view of the jurors, she somehow "contributed" to the rape by tempting the defendant or by putting herself in a vulnerable position. Victims of other crimes are simply not treated with such suspicion. Imagine a bank robber acquitted because he was tempted by the money in the bank or an aggravated assault charge dropped because the victim was small and presented an inviting target. Only rapists are accorded this special jury treatment.

Thus, juries in rape trials often focus on the victim and subject her to heavy scrutiny. At the same time, these juries are often predisposed to believe in the innocence of the defendant. These circumstances dispell the assumption that a rape charge is hard to disprove.

C. *A Rape Victim's Testimony Does* Not *Need to be Scrutinized More Carefully than the Testimony of Other Witnesses.*

The last element of the cautionary instruction is that the victim's testimony requires more careful scrutiny than the testimony of other witnesses.[73] The implied assumption that the victim's testimony is inherently untrustworthy is the most pervasive myth surrounding the crime of rape.[74]

---

68. S. BESSMER, *supra* note 53, at 126.

69. *See* H. KALVEN & H. ZEISEL, *supra* note 66, at 249-59.

70. *See* S. BESSMER, *supra* note 53, at 275-88; E. HILBERMAN, THE RAPE VICTIM 14 (1976); H. KALVEN & H. ZEISEL, *supra* note 66, at 249; Note, *supra* note 22, at 339-43.

71. *See* H. KALVEN & H. ZEISEL, *supra* note 66, at 249-57.

72. *See* H. FEILD & L. BIENEN, *supra* note 43, at 119.

73. *See generally* E. HILBERMAN, *supra* note 70, at 10-11 (during rape trial, victim's testimony often disbelieved).

74. *See* Simpson, *The "Blackmail Myth" and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation of a Legal Tradition,* 77 J. CRIM. L. & CRIMINOLOGY 101, 106-09 (1986) (myth that females frequently make up charges of rape prevalent both today and in the eighteenth century).

1. *Statistical Evidence.* The numbers are quite persuasive. Rape victims are much more frequently perceived as lying than are victims of other violent crimes. Of all forcible rape charges, twenty-one percent are rejected at screening due to the questionable credibility of the complainant, compared to two percent in aggravated assault cases, seven percent in robbery cases and two percent in burglary cases. Of all forcible rape charges, seven percent are dismissed because the complainant's story is considered implausible or contradictory to the testimony of others, compared to one percent in aggravated assault cases, four percent in robbery cases and one percent in burglary cases.[75]

The Gary Dotson case, in which Cathleen Crowell Webb recanted her allegations of rape years after her alleged assailant had been sent to prison, garnered national headlines and furthered the mistaken belief that women falsely accuse men of rape.[76] Outside of incest cases, however, the Webb incident is the *only* reported recantation of a rape accusation in the last ten years.[77] Even incest recantations are suspect—family members often deny to themselves that incest actually occurs.[78] Indeed, given the many pressures brought upon women who bring charges of rape, it is somewhat suprising that rape testimony is so rarely recanted[79]—and somewhat telling that the one recantaton of rape in the last ten years attracted so much national attention.

Indeed, a "blackmail myth"[80] has surrounded the crime of rape since the time of Lord Hale.[81] The blackmail myth, according to Antony Simpson, "is the legal crystallization of the assumption that the complainant in a rape prosecution is quite likely to have made her charge from motives corrupt, vindictive, or otherwise dishonest."[82]

Despite the pervasive myths, however, three separate studies confirm that women generally do not lie about being raped. One study, undertaken in Denver, examined police rape reports and found that in only three percent of the cases did the complainant admit to lying or did the police ultimately conclude from other evidence that the rape charge was fabricated.[83]

---

75. Williams, *Few Convictions in Rape Cases: Empirical Evidence Concerning Some Alternative Explanations,* 9 J. CRIM. JUST. 29, 32 (1981).

76. For an exhaustive analysis of the Gary Dotson case, see Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson,* 10 HARV. WOMEN'S L.J. 59, 74-87 (1987).

77. *Id.* at 83.

78. *Id.* at 83-84.

79. *Id.* at 84.

80. Simpson, *supra* note 74, at 106-28.

81. *Id.* at 106.

82. *Id.*

83. C. HURSCH, *supra* note 32, at 84.

A second study looked at 100 consecutive cases involving complaints of rape in Dade County, Florida and found that only seven percent of the cases were definitely not rape, and only another fifteen percent were labeled questionable.[84] Most importantly, all of these complaints were dismissed as unfounded.[85] The fact that a rape charge is labeled unfounded does not mean the victim was lying;[86] it merely means there are not enough facts for the police to conduct an investigation[87] and, as a resnlt, the case is screened out of the system well before trial.[88] Other factors often play a role in this decision—factors that have little to do with whether a rape actually occurred: how quickly a rape victim reported the attack to the police after the incident occurred;[89] the physical condition of the victim;[90] the struggle the victim put up before being raped;[91] her previous sexual history;[92] the behavior of the victim prior to the rape;[93] and the race of both the victim and her attacker.[94] Complaints are even labeled unfounded when the attacks occur outside the local jurisdiction or the victim fails to appear to discuss the incident further with the police.[95] For better or worse, the predilection of police to

84. Schiff, *Statistical Features of Rape,* 14 J. FORENSIC SCI. 102, 108 (1969).

85. *Id.* at 108-09.

86. *See* C. HURSCH, *supra* note 32, at 83-84 (In Denver, 9 cases out of 131 were labeled as unfounded because the rape happened outside the Police Department's geographical jurisdiction.).

87. S. KATZ & M. MAZUR, *supra* note 47, at 207 (" '[U]nfounded' has been used synonymously with 'false report.' But 'unfounded' is a term describing a false report from the law enforcement frame of reference and is based on the inability of law enforcers to verify the claim of rape."). Some of the factors police use to classify a rape charge as unfounded have little to do with the conduct of the assailant. *See* S. BROWNMILLER, *supra* note 3, at 366-68 (police likely to label date rapes, rapes in cars, rapes when victim intoxicated and rapes in which victim did not scream as unfounded). *See generally* Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia,* 117 U. PA. L. REV. 277, 280-81 (1968) (In Philadelphia, police investigators label one out of every five reported rapes as unfounded.).

88. S. KATZ & M. MAZUR, *supra* note 47, at 108-09; *see also* S. BESSMER, *supra* note 53, at 116-21 (Most false reports of rape are screened out early in the investigation process. Even if a few slip through, the adversary process is an excellent mechanism to catch false complaints.).

89. Comment, *supra* note 87, at 282-86 (The sooner a rape complaint is reported the less chance that an investigator will label it unfounded.).

90. *Id.* at 286-89 (Investigators are likely to label a rape report unfounded if there are no indications of violence.).

91. *Id.* at 293-99 (Because physical struggle indicates a lack of consent, investigators are unlikely to label these cases as unfounded.).

92. *Id.* at 299 (Rape complainants with bad sexnal reputations are less likely to be believed.); *cf. supra* note 52 and accompanying text.

93. Comment, *supra* note 87, at 289-93 (sobriety, location of attack and previous relationship between victim and attacker are examples of prior behavior likely to result in a rape report being marked as unfounded).

94. *Id.* at 302-06 (Minority rape victims are more likely to have their complaints labeled as unfounded by the police. The highest unfounded rate [22%] occurs when blacks rape blacks.).

95. *See* C. HURSCH, *supra* note 32, at 83-84.

label rapes as unfounded makes a warning to juries that women blackmail men absurd.

A third study, consisting of evidence from New York City, further supports the proposition that women rarely fabricate rape charges. A Rape Analysis Squad chaired by female police officers discovered that only two percent of the rape charges brought were false, a figure no greater than the percentage of false accusations for other felonies.[96]

There are a variety of reasons why these three studies indicate a low probability that any given rape charge is fabricated. As discussed above, rape is a highly underreported crime.[97] Women's hesitancy to bring a rape charge and the resulting trauma if they do, provide a check against false complaints.[98] Given the terrifying experiences of rape victims in court,[99] it is counterintuitive that women would falsify rape charges. Also, "few women are likely to believe that being a rape victim would enhance their status and worth in the eyes of others. Hence, a motive for fabricating such experiences . . . is likely to be rare indeed."[100] Finally, rape charges are no more likely to be fabricated than other charges of violent crime, and, in fact, there is *no* evidence that false rape charges are brought with any greater frequency than false charges of other crimes.[101]

2. *Alternatives to the Cautionary Instruction.* Even if there were a significant problem with complainants falsifying rape charges, the cautionary instruction would not be needed. As discussed above, certain mechanisms make rape charges difficult to bring and even more difficult to litigate.[102] While these mechanisms, such as police and prosecutorial discretion, often frustrate valid rape charges, they also eliminate the most baseless ones. Because the pre-trial hurdle is already prohibitively high, the added obstacle of the cautionary instruction is unnecessary. In addition, other mechanisms effectively screen out baseless allegations—without penalizing women who actually have been raped.

The first mechanism that screens out false allegations is police dis-

96. S. BROWNMILLER, *supra* note 3, at 366.

97. *See supra* notes 22-32 and accompanying text.

98. *See* S. BESSMER, *supra* note 53, at 115-16 (The fact that rape is so underreported and that the trial is such a traumatic experience for the victim suggests that there is little motive for a complainant to fabricate a rape charge.).

99. *See supra* notes 2, 32, 37-38 and accompanying text.

100. Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females,* 7 VICTIMOLOGY 81, 85 (1982).

101. *See* Simpson, *supra* note 74, at 107; *see also* S. KATZ & M. MAZUR, *supra* note 47, at 212-13 (Studies and statistics indicate "the percentage of actual false reports of rape may be as low as or lower than most other crimes.").

102. *See* S. BESSMER, *supra* note 53, at 114-17; LeGrande, *supra* note 21, at 931; Schwartz & Clear, *Toward a New Law on Rape,* 26 CRIME & DELINQ. 129, 132-33 (1980).

infant witness,[111] and Lord Hale used the cautionary instruction solely in this context. When later writing about more typical rape cases, Lord Hale stated that the victim's credibility should be left to the jury.[112]

The Supreme Court of California noted there is "nothing in Hale's writings to suggest that, as a matter of course, 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."[113] Nonetheless, Lord Hale's instruction in one atypical case developed into an established part of the English common law.

B. *Due Process Safeguards Render Hale's Cautionary Instruction Unnecessary.*

The legal system in which Lord Hale worked did not afford many due process safeguards to those accused of crimes.[114] Because of the inadequate protection for defendants, the seventeenth century did face a problem of unwarranted rape prosecutions. In eighteenth and early nineteenth century London, there were at least twenty-five documented cases of complainants being paid to falsely accuse others of rape.[115] A rape complaint conceivably could provide a convenient mechanism to extort money from the person accused.[116]

Today, due process safeguards render the cautionary instruction ob-

111. People v. Rincon-Pineda, 14 Cal. 3d 864, 877, 538 P.2d 247, 256, 123 Cal. Rptr. 119, 128 (1975); Note, *Cautionary Instruction in Sex Offense Trial Relating Prosecutrix's Credibility to the Nature of the Crime Charged is No Longer Mandatory; Discretionary Use is Disapproved,* 4 FORDHAM URBAN L.J. 419, 421 (1976).

112. *See* M. HALE, HISTORIA PLACITORUM CORONEA: THE HISTORY OF THE PLEAS OF THE CROWN 633 (1778) ("The Party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in the testimony."); *see also* Note, *Rape Instructions—Requiring Jury to Examine Rape Victim's Testimony with Caution is Inappropriate to Modern Trial Proceedings*—People v. Rincon-Pineda, 16 SANTA CLARA L. REV. 691, 692 (1976) (Hale's cautionary instruction not meant to be given uniformly at end of all rape trials).

113. *Rincon-Pineda,* 14 Cal. 3d at 877, 538 P.2d at 256, 123 Cal. Rptr. at 128.

114. *See generally* Thompson v. State, 399 A.2d 194, 198 (Del. 1979) (In Lord Hale's time, due process safeguards were relatively underdeveloped.); Note, People v. Rincon-Pineda: *Rape Trials Depart the Seventeenth Century—Farewell to Lord Hale,* 11 TULSA L.J. 279, 281-82 (1975) ("Contrasting the state of seventeenth century criminal procedure with modern due process the court in *Rincon-Pineda* demonstrated that Hale's caution was reasonable during his time. In the seventeenth century the accused was expected to address the jury without benefit of counsel. He was not presumed innocent, and to convict him it was not necessary to prove his guilt beyond a reasonable doubt. Furthermore, his rights to present witnesses in his defense and to compel their attendance at trial were barely nascent. Therefore, the defendant was 'often pitiable, even if he ha[d] a good case.' ").

115. Simpson, *supra* note 74, at 113-14.

116. *See generally id.* at 115-16 (Extortion may be too harsh because most blackmailers only obtained small sums of money and many were genuine victims seeking monetary redress.).

solete.[117] The court in *People v. Rincon-Pineda* [118] listed several of these safeguards: the right to present witnesses and compel their attendance, the right to counsel and the presumption of innocence. Armed with these "potent accouterments of due process," defendants no longer need "the additional constraint of Hale's caution."[119]

IV. LEGAL PROBLEMS WITH THE CAUTIONARY INSTRUCTION

The cautionary instruction is not simply an antiquated yet harmless tool used by state courts across the United States. It presents three legal problems that require its prohibition.

First, the cautionary instruction, by focusing on the victim's credibility, places a greater burden on her than on other witnesses at a rape trial.[120] This judicial treatment of the victim during a rape trial is at best arbitrary, as it singles out someone who is no more likely to lie than any other witness.[121] As the Florida Supreme Court explained in eliminating the caution of Lord Hale as a jury instruction, there is "no unique reason why those accused of sexual battery should occupy a status different from those accused of any other crime where the ultimate factual issue at trial pivots on the word of the victim against the word of the accused."[122] Rape trials are not the only proceedings likely to be reduced to the testimony of the victim against the testimony of the accused; this pattern often arises in assault, attempted murder and robbery cases.[123] Yet cautionary instructions are limited solely to rape cases.[124]

Second, the cautionary instruction usurps the traditional function of the jury by weighing the evidence for them. The cautionary instruction, by singling out a particular witness, serves as a "directive to the jury as to how they should evaluate evidence, rather than a statement of law."[125] Having observed the demeanor of all the witnesses at the trial, the jury is in a better position to evaluate the credibility of each witness if it has not been prejudiced by a mechanical cautionary instruction.

---

117. *See* State v. Gross, 351 N.W.2d 428, 434 (N.D. 1984) (The jury has an affirmative duty to impartially weigh all of the evidence.); Marr v. State, 494 So. 2d 1139, 1142 (Fla. 1986) (Easy access to appellate review is among the "full panoply of due process rights.").

118. 14 Cal. 3d 864, 878, 538 P.2d 247, 256-57, 123 Cal. Rptr. 119, 128-29 (1975).

119. *Id.* at 878, 538 P.2d at 257, 123 Cal. Rptr. at 129.

120. State v. Feddersen, 230 N.W.2d 510, 515 (Iowa 1975) ("[T]he court should not single out any witness and burden his [or her] testimony with any suggestion which might indicate to the jury that the court believed the witness was likely to testify falsely.").

121. *See id.; see also supra* notes 83-86, 96-101 and accompanying text.

122. Marr v. State, 494 So. 2d 1139, 1142 (Fla. 1986).

123. S. BESSMER, *supra* note 53, at 110-11.

124. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 883, 538 P.2d 247, 260, 123 Cal. Rptr. 119, 132 (1975); *Feddersen,* 230 N.W.2d at 515.

125. State v. Studham, 572 P.2d 700, 702 (Utah 1977).

Not only does the cautionary instruction usurp an important function of the jury, it often confuses the jurors.[126] This is especially likely if the female witness is credible and her testimony convincing. The cautionary instruction, urging the jury to pay special attention to even a credible victim's testimony, insinuates to the jury that something about the testimony bothers the judge. As a result, the jurors become more skeptical of the victim's credibility.[127]

Third, the cautionary instruction represents an impermissible comment on the evidence. This instruction closely resembles an expression of the judge's personal opinion and is often perceived that way by the jury.[128] The cautionary instruction is not a statement of law,[129] therefore absent any special circumstances—such as incompetency—there is no reason for the judge to caution the jury about the victim's testimony.

Cautioning the jury to scrutinize carefully the testimony of the complainant "may or may not have validity in a given case."[130] In the American judicial system, it is the jury's function to evaluate the credibility of each witness. The jury often relies on instructions from the judge for guidance. Instructions help to "clarify the jurors' understanding of both their task and the law." [131] As a result, instructions often influence the ultimate outcome of the trial, especially if the instruction singles out a specific party and asks that her testimony be scrutinized carefully.[132] When this happens at rape trials, the quest for truth is impeded.

A recent study by Oros and Elman[133] addresses the impact of the cautionary instruction. The researchers conducted two mock rape trials using male and female jurors and compared the results. In one trial, the jury was given a cautionary instruction, and in the other, the jury was not.[134] The researchers concluded that "[s]ubjects (jurors) were more lenient toward the defendant when the 'cautionary charge' . . . was used

126. State v. Gross, 351 N.W.2d 428, 434 (N.D. 1984).

127. *See* Oros & Elman, *Impact of Judge's Instruction Upon Jurors' Decision: The "Cautionary Charge" in Rape Trials,* 10 REPRESENTATIVE RES. SOC. PSYCH. 28, 32-34 (1979) (cautionary instruction decreases victim's credibility and as result jurors are more skeptical about victim's testimony).

128. *See* State v. Settle, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975); State v. Farlett, 490 A.2d 52, 56 (R.I. 1985).

129. State v. Feddersen, 230 N.W.2d 510, 515 (Iowa 1975).

130. *Id.*

131. *See* Oros & Elman, *supra* note 127, at 28.

132. *Cf.* Lyons & Regina, *Mock Jurors' Behavior as a Function of Sex and Exposure to an Educational Videotape about Jury Duty,* 58 PSYCHOLOGICAL REP. 599, 599 (1986) (judge's instructions often influence verdict of jurors).

133. *See* Oros & Elman, *supra* note 127, at 28.

134. The text of the cautionary instruction given by the two researchers read: "The charge of rape is easy to make, difficult to prove, and more difficult to disprove; therefore, the testimony of the complaining witness must be examined with caution." *Id.*

than when other instructions were given."[135] This leniency resulted in less severe sentences and more acquittals.[136] The results of this study support the suspicion that the cautionary instruction greatly prejudices the jury.

Another study by Doctors Lyons and Regina[137] affirms this assessment. The subjects of the study were divided into two groups. One group viewed a video tape warning them to be cautious in their verdict; the other group did not. A two-page edited version of a rape trial was then given to each group of jurors. After both groups were familar with the trial transcript, they were asked to decide whether the defendant was guilty. Those who viewed the tape before the trial "were significantly more cautious in assigning a guilty verdict than those who had not."[138] The only variable in the study was that one set of jurors was urged to be cautious while the other set was not. This variable significantly influenced the verdict of each group. In a real courtroom situation this bias perhaps would be even greater. In the study, the mock jurors were only presented with a video tape, while in the courtroom it is the imposing figure of the judge who issues the cautionary instruction.

V. A RECOMMENDATION TO PROHIBIT THE CAUTIONARY INSTRUCTION

The only way to end the prejudice engendered by the cautionary instruction is to prohibit it. There are two ways to do so: by judicial decree,[139] or through legislative enactment.[140]

As long as the end result is the elimination of this antiquated instruction, the means are not important. Given a choice, however, this is probably an area in which state legislatures should take the initiative. Not all courts are willing to ban the cautionary instruction without legislative guidance;[141] as the philosophy of judicial restraint becomes more

135. *Id.*

136. *Id.* at 32-34.

137. *See* Lyons & Regina, *supra* note 132, at 599.

138. *Id.* at 602.

139. *See supra* note 13 (Alaska, Arizona, California, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, North Dakota, Ohio, Oregon, Virginia, Washiugton and Wyoming have judicially banned the cautionary instruction).

140. *See supra* note 12 (Colorado, Minnesota, Nevada, Pennsylvania and South Dakota have legislatively prohibited Lord Hale's caution.).

141. Maryland preseuts the best example of state court hesitatiou. *See* Rhoades v. State, 56 Md. App. 601, 468 A.2d 650 (1983). In *Rhoades,* the court of special appeals recognized that the cautionary instruction is outdated. *Id.* at 611, 468 A.2d at 655. But the court refused to eliminate it because the General Assembly had considered and rejected previous legislation to prohibit the cautionary instruction. *Id.* at 611-12, 468 A.2d at 655. The court concluded these actions are "indica-

prevalent,[142] it falls to the legislatures to eliminate the instruction of Lord Hale.

Colorado provides the best model of a legislative prohibition of the cautionary instruction.[143] The Colorado statute states:

> [In rape trials] the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given.[144]

This instruction cleanly eliminates the cautionary instruction without being too broad. There is still room in an especially volatile rape case for the judge, in his or her discretion, to caution the jury to view the testimony of all the witnesses in the trial with caution. There are many examples of instructions, similar to Colorado's, which caution the jury without subjecting the alleged victim to special scrutiny[145] or singling out the testimony of the victim.

CONCLUSION

Despite its widespread use in rape trials, the cautionary instruction is based on three erroneous assumptions. Rape is not an easily made charge; rape is not a difficult charge to disprove, especially when compared with other violent crimes; and the rape victim is no more likely to fabricate a charge than other witnesses at the trial—besides, the adversarial process is designed to catch the occasional complainant who falsifies a charge of rape.

Not only are the elements of the cautionary instruction empirically invalid and legally erroneous, the instruction itself is taken out of its historical context. Lord Chief Justice Hale cautioned a jury three hundred years ago in a case dealing with a mentally incompetent complainant. Given the widespread changes in procedural due process, the cautionary instruction should be buried with other legal relics of the past. Any pro-

---

tive of the legislature's intent to retain the use of the Lord Hale instruction under the proper factual circumstances." *Id.* at 612, 468 A.2d at 655.

142. *Cf.* Bork, *The Constitution, Original Intent, and Economic Rights,* 23 SAN DIEGO L. REV. 823, 823-32 (1986) (original intent is only legitimate basis for interpreting the Constitution).

143. COLO. REV. STAT. § 18-3-408 (1986).

144. *Id.*

145. *See, e.g.,* State v. Jones, 62 Haw. 572, 582, 617 P.2d 1214, 1221 (1980) ("In evaluating a witness, you may consider the appearance and demeanor of a witness on the witness stand, his manner of testifying, his degree of intelligence, his apparent candor or frankness or lack thereof, his interest, if any, in the result of the case, his temper, feeling or bias, if any has been shown, his character as shown by the evidence, his means and opportunity of acquiring information, *the probability or improbability of his testimony,* and all other circumstances surrounding the witness and bearing upon his credibility." (quoting People v. Rincon-Pineda, 14 Cal. 3d 864, 884, 538 P.2d 247, 261, 123 Cal. Rptr. 119, 133 (1975))).

bative value the cautionary instruction may have is substantially outweighed by its prejudicial impact.

It is immaterial whether the legislature or the judiciary takes the lead in prohibiting the cautionary instruction. What is important is that the instruction be eliminated as quickly as possible, so that the victim of rape is no longer arbitrarily prejudiced at the conclusion of an already burdensome trial.

A. Thomas Morris