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Maintaining the Presumption of Innocence in Date Rape Trials Through the Use of Language Orders: State v. Safi and the Banning of the Word "Rape"

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MAINTAINING THE PRESUMPTION OF INNOCENCE IN DATE RAPE TRIALS THROUGH THE USE OF LANGUAGE ORDERS: *STATE V. SAFI* AND THE BANNING OF THE WORD "RAPE"

ABSTRACT

This note evaluates the use of language orders in date rape trials in which the defense is consent through a case study of *State v. Safi*, in which Tory Bowen claims that Pamir Safi date raped her. In that case, the trial judge granted a motion by the defense to prevent the prosecution and any of their witnesses from using words such as "rape" and "sexual assault." Using *State v. Safi* as a starting point, the author examines the use of such trial orders from the perspective of both defendants and victims. The author concludes that a modified version of such language orders would effectively preserve the presumption of innocence afforded to all criminal defendants without sacrificing a fair opportunity for victims to see their attackers convicted.

INTRODUCTION

On the morning of October 31, 2004, Bethany ("Tory") Bowen says she was raped.[1] Her ordeal began on October 30, 2004 when she and some friends went to a bar in Lincoln, Nebraska called Brothers.[2] There, Bowen, a student at the University of Nebraska, met Pamir Safi, an Army reservist with whom she shared some drinks.[3] While at the bar, Bowen and Safi kissed, and at one a.m. they left Brothers

1. Affidavit of Probable Cause at 1, State v. Safi, No. CR05-87 (Neb. Dist. Ct. Nov. 23, 2004) (on file with author).

2. Paul Hammel, *Two Say 'Cleansing' of Court Language Goes Too Far*, OMAHA WORLD-HERALD, June 7, 2007, *available at* http://www.omaha.com/index.php?u_page=2798&u_sid=2397636; *id.* at 1.

3. Meg Massey, *Putting the Term "Rape" on Trial*, TIME, July 23, 2007, *available at* http://www.time.com/time/ (search by article title; then follow hyperlink).

together.[4] At this point in the night, Bowen's and Safi's stories diverge. Bowen says the next thing she knew it was morning, she was covered in vomit, and Safi was in the process of raping her.[5] When Bowen asked Safi to stop, he did.[6] Bowen has no recollection of meeting Safi.[7] Safi says they had consensual sex.[8] Safi says that to his knowledge Bowen did not vomit in his home, but he admits that she "may have vomited a little in his vehicle."[9]

Lancaster County Attorney Gary Lacey's office decided to prosecute Safi.[10] In a pretrial conference, Safi's attorney, Clarence Mock, moved to bar the prosecution from using or eliciting witness testimony containing the words "rape," "sexual assault kit," "victim," and "assailant."[11] The motion was made pursuant to Nebraska Rule of Evidence 403, which blocks admission of relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice."[12] Lancaster County District Judge Jeffre Cheuvront signed the order.[13]

The trial began on October 23, 2006, and on November 6, Cheuvront declared a mistrial based on a hung jury.[14] Seven jurors, of which five were women, were in favor of conviction.[15] The other two female jurors voted to acquit Safi.[16] A second trial was scheduled to begin in July 2007, but it, too, was declared a mistrial, this time during jury selection.[17] According to Cheuvront, the intense publicity surrounding the case made it impossible to select impartial jurors.[18] The third trial will occur sometime in the future, possibly in a different county, says Cheuvront.[19]

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4. *See* Clarence Mabin, *Jurors Saw Witnesses Differently*, LINCOLN J. STAR, Nov. 12, 2006, *available at* http://www.journalstar.com/articles/2006/11/12/local/doc45565b0e3336f182485880.txt (recounting trial testimony that Bowen and Safi kissed at the bar).

5. Bowen v. Cheuvront, 516 F. Supp. 2d 1021, 1023 (D. Neb. 2007); Affidavit of Probable Cause, *supra* note 1, at 1.

6. Dahlia Lithwick, *Gag Order*, SLATE, June 20, 2007, http://www.slate.com/id/2168758.

7. *See Cheuvront*, 516 F. Supp. 2d at 1023.

8. Affidavit of Probable Cause, *supra* note 1, at 1.

9. *Id.*

10. Hammel, *supra* note 2.

11. Motion in Limine: Prejudicial Terms at 1, State v. Safi, No. CR05-87 (Neb. Dist. Ct. Oct. 10, 2006) (on file with author) [hereinafter Motion in Limine].

12. NEB. REV. STAT. § 27-403 (2007).

13. *See Cheuvront*, 516 F. Supp. 2d at 1024.

14. *Id.*; Mabin, *supra* note 4.

15. Hammel, *supra* note 2.

16. *Id.*

17. *Judge Declares Mistrial in Highly Publicized Rape Case*, SIOUX CITY J., July 12, 2007, *available at* http://www.siouxcityjournal.com/ (follow archive hyperlink; perform advanced search; follow hyperlink).

18. *Id.*

19. *Id.*

This note argues that *State v. Safi*[20] is a microcosm of the legal treatment of date rape in today's courtrooms.[21] As such, this note asserts that language orders can prove a useful and necessary tool for preserving the rights of criminal defendants in date rape trials. It is a central premise of the American legal system that in trials, judges will seek to ensure the objectivity and fairness of the adjudication as much as possible for both parties.[22] Indeed, this is the position taken by the defense in *State v. Safi* — the use of language orders is necessary to preserve the fairness of the adjudication.[23] The Rules of Evidence, moreover, are designed for a similar end.[24] The federal counterpart to the Nebraska statute, Federal Rule of Evidence 403,[25] is a mainstay of today's trial system. The issuance of the language order in *State v. Safi* shows that defendants' rights are becoming important in today's legal system.

In recent decades, defendants have increasingly fallen victim to rules and treatment, inspired primarily by political correctness, that shortchange them of their constitutional rights, whether guilty or not.[26] Due to this modern trend, the presumption of guilt against alleged perpetrators of date rape is already stacked against them in today's politically correct atmosphere.[27]

Cheuvront went further, however, than most judges usually do in making Safi's trial fair for him, namely by barring the word

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20. State v. Safi, No. CR05-87 (Neb. Dist. Ct. Oct. 10, 2006).

21. This note focuses solely on rape and date rape where the complainant is female and the accused is male. By limiting this focus, I do not intend to minimize or ignore similar issues pertaining to date rape between two men, two women, or when the complainant is a man and the accused is a woman. Rather, I wish to examine the potential correlation between the "male" nature of the legal system and patriarchy as a whole, which has historically included sexual domination.

22. *See, e.g.*, NEB. CODE OF JUDICIAL CONDUCT, § 5-203(5) cmt. (2008) ("A judge must perform judicial duties impartially and fairly. A judge who manifests bias or prejudice on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."). Furthermore, that the accused is innocent until proven guilty is also "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

23. Clarence Mabin, *Banned Words Debated in Sex Assault Case*, LINCOLN J. STAR, June 17, 2007, *available at* http://www.journalstar.com/articles/2007/06/17/news/local/doc46745fdc16768519275420.txt.

24. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration."); NEB. REV. STAT. § 27-102 (2007) (adopting the language of FED. R. EVID. 102).

25. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

26. *See* discussion *infra* Part III.

27. *See, e.g.*, STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT 373 (2007) ("'In the 1970s and 1980s, the pendulum began to swing and we entered an era in which rape victims were always believed and the defendant was presumed guilty because it became wrong to question a victim of rape.'") (quoting Jim Cooney, attorney for the Duke lacrosse players acquitted of rape).

"rape."[28] This raises the question as to whether too much fairness can, in fact, be unfair. The other side of the spectrum represented in this case is the outrage experienced by many Americans caused by the American legal system's failure to successfully prosecute date rapists.[29] In some instances, the courtroom atmosphere itself seems to protect the men who prey on innocent women.[30] For many American women, our legal system helps to facilitate date rape, perpetrating a "second rape" on the victim.[31] Thus, *State v. Safi* represents the need for a careful balancing of the rights of the accused with those of the accuser.

Underlying this discourse of balancing is an immense ambivalence on the part of the American legal system, and by extension American society itself, as to what constitutes date rape.[32] A rape that leaves its victim bruised and bloody is easy to understand, but a rape, the commission of which might accurately be said to come down to the subjective issue of consent, is difficult to conceptualize for some.[33] *State v. Safi* encapsulates this ambivalence as well as the complexity of date rape today.

Of central importance in this analysis is the fact that date rape trials are different than other rape trials.[34] In a "pure" example of date rape, there is no evidence of force; there are no witnesses besides the complaining witness and the defendant; there may not even have been a manifestation of protest by the complaining witness. In short, the crime is nearly unknowable by anyone who was not a party to it.[35] The commission of the crime can theoretically come down to a miscommunication of intent.[36] That, of course, is not always the case.

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28. Lithwick, *supra* note 6.

29. *See, e.g.*, Massey, *supra* note 3 (describing the publicity and protests organized by a rape victim advocacy group outside the courthouse during jury selection for Safi's second trial).

30. *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 81-99 (1999) (discussing the way the adversarial nature of a rape trial creates a further challenge to rape victims seeking justice); *see generally* LEE MADIGAN & NANCY GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM (1991) (exploring the societal and legal treatment of rape victims who come forward with their stories only to be further abused).

31. *See* MADIGAN & GAMBLE, *supra* note 30, at 5-6 ("The 'second rape' is the act of violation, alienation, and disparagement a survivor receives when she turns to others for help and support."); Dahlia Lithwick, Op-Ed, *The Shield That Failed*, N.Y. TIMES, Aug. 8, 2004, at WK11.

32. *See* discussion *infra* Part II.

33. *See, e.g.*, SUSAN ESTRICH, REAL RAPE 3 (1987) (explaining why the author is "lucky" in that she was raped by a stranger because "everyone agrees that I was 'really' raped").

34. *See, e.g.*, Lithwick, *supra* note 31 (referring to the judicial system's virtual inability to resolve date rape cases, especially those that receive massive media attention).

35. TAYLOR & JOHNSON, *supra* note 27, at 372.

36. *See, e.g.*, MARK COWLING, DATE RAPE AND CONSENT 81 (1998) (noting the difficulty in distinguishing certain behaviors as consensual or nonconsensual); *see also* Lithwick,

Yet in this kind of case communication often becomes muddied, "no" may or may not mean "no," and fear may or may not be rational. As opposed to many other legal concepts, date rape has no bright line. This feature of date rape differentiates it from other forms of rape.[37] In most rape trials, there is no question that a crime has occurred. Conversely, in date rape trials, the central question for the jury is whether a crime occurred.[38] If not, the physical interaction between the accuser and the accused is legally deemed to be consensual sex.

The first part of this note details what happened specifically in *State v. Safi*. The second part explores the concept of consent. The third part examines the legal treatment of defendants in date rape cases, particularly as explored through the lens of language orders. The final part discusses feminist criticism of the legal treatment of date rape complainants and language orders. After analyzing two quite different perspectives, that of defendants' rights advocates and that of date rape complainants' advocates, this note takes the position that defendants facing charges of date rape should be afforded the same protection as other criminal defendants — that is, they should be presumed innocent until proven guilty. Although date rape complainants have not historically been treated fairly,[39] the over-compensatory swing of the pendulum of justice undermines our system when it presumes a defendant guilty. Exceptions cannot be made if the purity of the legal system is to be maintained. Language orders are a useful tool in restoring the overall fairness of date rape trials. That said, many feminist critiques of today's legal treatment of date rape victims are valid. The inadequacy of our legal system in providing redress for the victims of this nearly unknowable crime clearly cannot stand. The solution cannot lie, however, in a compromise of our most fundamental legal principles.

I. *STATE V. SAFI*

As mentioned, the first mistrial in *State v. Safi* resulted from a hung jury, split 7-5.[40] If the case simply concerned a man and a woman having sex, albeit under the influence of alcohol, the jury

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supra note 31 (noting that date rape cases center on the subtleties of an accuser's consent and the defendant's ability to comprehend the accuser's behavior).

37. COWLING, *supra* note 36, at 81; ESTRICH, *supra* note 33, at 3-7.

38. Sherry F. Colb, *Animosity Toward Kobe Bryant's Accuser*, FINDLAW, Oct. 22, 2003, http://writ.news.findlaw.com/colb/20031022.html.

39. For instance, until recently in this country, a woman's physical resistance to unwanted sex was a necessary element to the crime of rape, even if resistance meant exposure to great harm. *See* ESTRICH, *supra* note 33, at 29-37.

40. Lithwick, *supra* note 6.

might have had little trouble acquitting Safi. There was evidence, however, regarding both Bowen and Safi that the jury found troubling.[41]

Evidence was introduced that Pamir Safi had been accused of similar acts twice before, though he had never been convicted.[42] Bowen was the third woman since 2001 to accuse Safi of sexual assault, and, moreover, the accusations were nearly identical.[43] In both of the prior incidents, women who had become drunk fell asleep wearing clothing but woke up naked.[44] The women awoke to find Safi having sex with them.[45] The first incident took place in a military barracks at Fort Riley, Kansas in 2001; the second incident took place at a Kansas City motel in 2004.[46] The first incident was dismissed by a military court.[47] In the second incident, the complaining witness did not make a complaint until several weeks after the incident, and the prosecutors declined to press charges.[48]

The victims of these alleged crimes were allowed to testify at Safi's trial.[49] Normally, evidence of prior acts is not admissible in order to prove action in conformity,[50] but Judge Cheuvront allowed the evidence to be used to "'show Safi's plan to have sexual relations with a person who was incapable of resisting or appraising the nature of her conduct.'"[51] Clearly, then, the court recognized Safi's pattern of, at a minimum, dubious sexual conduct.

Bowen's testimony also raised problematic questions. Following the first mistrial, some of the jurors reported that three inconsistencies in Bowen's story played a large role in the jurors' decision in favor of acquittal.[52] First, the nurse who examined Bowen testified that Bowen claimed Safi had sex with her around two a.m.[53] This of course contradicted Bowen's assertion that she awoke at 7:15 a.m. to find Safi having sex with her and that she had no memory of any events after she left the bar.[54] Next, Bowen testified that she had left Safi's apartment approximately five to ten minutes after awaking, but

41. *See* Mabin, *supra* note 4 (noting that members of the jury doubted the veracity of both Safi's and Bowen's testimony).

42. *Id.*

43. *See id.* (noting that the three accusers' allegations against Safi shared certain commonalities).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. FED. R. EVID. 404(b); NEB. STAT. ANN. § 27-404(2) (2007).

51. Mabin, *supra* note 4.

52. *Id.*

53. *Id.*

54. *Id.*

Clarence Mock presented evidence, including cell phone records, that she laid in bed with Safi for an hour before he drove her home.[55] Finally, Bowen testified that she instructed Safi to drop her off a few blocks from her house, but on cross examination, she said he dropped her off at her home.[56] The inconsistencies hurt Bowen's credibility for some of the jurors.[57] As one stated after the trial, "'I guess if you're truly a victim, you don't need to lie to make your point.'"[58]

Another point of contention emphasized by defense attorney Mock was whether Bowen was as intoxicated as she claimed.[59] Over the course of the evening, Bowen says she drank about four vodka and Red Bull cocktails.[60] According to two of the prosecution's own witnesses, including Bowen's closest friend, Bowen did not appear overly intoxicated.[61] The implication, of course, was that if Bowen's best friend could not see how drunk Bowen was, Safi could not be expected to have done so either. In her own defense, Bowen suggested she may have been drugged.[62] The police report indicates that video footage from the night in question shows that Bowen had difficulty walking when she left the bar and required support from Safi.[63]

For the jurors who sought to acquit Safi, the facts did not point to Safi's innocence.[64] Rather, they presented reasonable doubt.[65] That the prosecution's witnesses actually helped the defense only exacerbated the situation. One juror, who wanted to acquit, believed Safi was not guilty.[66] Another, Milt Foreman, simply felt he could not convict a man he considered guilty without a better case.[67] "'I prayed they'd try this guy again .... Not guilty didn't mean we didn't think he did it. "Not guilty" says the state didn't prove its case.'"[68]

Based on these insights into the jury's deliberative process, one would think that *State v. Safi* was just an ordinary case that could not be resolved. But Bowen thinks the outcome hinged on Cheuvront's language order.[69] As five jurors, four of whom favored acquittal, noted,

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Bowen v. Cheuvront, 516 F. Supp. 2d 1021, 1023 (D. Neb. 2007).
63. Affidavit of Probable Cause, *supra* note 1, at 2.
64. Mabin, *supra* note 4.
65. *Id.*
66. *See id.* (noting juror Morrison's refusal to concede that Safi was guilty).
67. *See id.*
68. *Id.*
69. Bowen v. Cheuvront, 516 F. Supp. 2d 1021, 1024 (D. Neb. 2007).

the case hinged on the credibility of Safi and Bowen, not on the language order.[70]

The language motion probably was not filed with the intention of making news. Similar motions are frequently filed and granted throughout the United States.[71] According to Mock, the purpose of the motion was to level the playing field.[72] The legal question of whether a defendant committed sexual assault is one for the jury to answer based on the evidence.[73] "'Under the rules of evidence,'" asserts Mock, "'witnesses can't reach legal conclusions.'"[74] For Mock, the issue of language in the courtroom fits within a broader, literary conception of jurisprudence: "'Trials are competing narratives of what happened . . . . They should not turn on politicized hyperbole. They should turn on the facts.'"[75] Once a word like rape is used in the courtroom, Mock says, "'the skunk is in the jury box and it's hard to get the smell out.'"[76]

Bowen and her lawyers think that the language order significantly impaired her case.[77] On the one hand, they feel that Bowen's testimony sounded unnatural because she had to pause frequently over the course of her thirteen-hour stint on the witness stand.[78] Bowen thinks the jurors may have felt she was choosing to use the word "sex" as opposed to "rape" because they were not aware of Cheuvront's order.[79] At the same time, Bowen and her lawyers, particularly Wendy Murphy, an infamous guest on political talk shows and adjunct professor at the New England School of Law,[80] argue that the order did more than cause Bowen to pick and choose her words with care — they think the order violated Bowen's First Amendment rights.[81] "'In my mind, what happened to me was rape,'" Bowen says.

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70. Mabin, *supra* note 4.

71. *See* Mabin, *supra* note 23 (referring to a statement by Bruce Lyons, former president of the National Association of Criminal Defense Lawyers, that there were comparable orders in other jurisdictions); *see also* discussion *infra* Part III.

72. *See* Hammel, *supra* note 2.

73. Mabin, *supra* note 23.

74. *Id.*

75. *Id.*

76. Massey, *supra* note 3.

77. *See id.* (identifying Wendy Murphy as Bowen's attorney). See Mabin, *supra* note 23, in which Bowen notes the enormity of the ban's effect, and Wendy Murphy, one of Bowen's attorneys, notes that even subtle alterations in language can have powerful consequences.

78. *See* Mabin, *supra* note 23.

79. *Id.*

80. Durham-in-Wonderland, http://durhamwonderland.blogspot.com/ (Dec. 31, 2006, 12:01 EST).

81. *See* Motion for Reconsideration of the Court's Language Order 2-3, State v. Safi, No. CR05-87 (Neb. Dist. Ct. July 11, 2007) (on file with author) [hereinafter Motion for Reconsideration].

"'I want the freedom to be able to be able to point [to Safi] in court and say, "That man raped me."'"[82]

From Mock's perspective, of course, Bowen's First Amendment claims are unfounded.[83] "'She, like any other witness, is subject to the rules of evidence . . . . To say that there is a First Amendment right of the witness to say whatever they want in a courtroom is a silly notion.'"[84] Indeed, when Bowen sued Cheuvront in federal court to stop him from violating her First Amendment rights, Judge Richard Kopf agreed with Mock, noting in his opinion that "this case is not 'extraordinary.' Witnesses, who also claim to be victims, are subjected to all sorts of limitations on their testimony in all sorts of criminal cases in all sorts of courtrooms for all sorts of reasons. Ms. Bowen and her case are not special."[85]

But to some critics of the legal system's treatment of date rape, the language order is one more indication that the legal system is fundamentally male in nature.[86] As Michelle Anderson, Dean of the City University of New York Law School, stated, "'[t]he notion that the word rape is so charged derives from an historical willingness to place a higher burden on rape victims who come forward.'"[87]

Whether or not Anderson's statement is true, one cannot ignore that Pamir Safi faced a potential fifty-year prison sentence for first-degree sexual assault.[88] For Anderson, concern over the language order was about the implications of the order for women as a sex;[89] for Safi, the order signified an attempt to prevent the prosecution from labeling him as guilty of a very serious crime before the jury had

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82. Mabin, *supra* note 23.

83. Massey, *supra* note 3.

84. *Id.*

85. Bowen v. Cheuvront, 516 F. Supp. 2d 1021, 1030 (D. Neb. 2007). Judge Kopf also noted, however:

> For the life of me, I do not understand why a judge would tell an alleged rape victim that she cannot say she was 'raped' when she testifies in a trial about rape. Juries are not stupid. They are very wise. In my opinion, no properly instructed jury is going to be improperly swayed because a woman uses the word 'rape' rather than some tortured equivalent for the word.

Id. at 1029 n.8. The legal conclusion of *Bowen v. Cheuvront*, in which Bowen sought to have the federal court intervene in the state case by offering guidance to Cheuvront, was not favorable for Bowen. *Id.* In addition to refusing to enter declaratory relief for Bowen due to issues of federalism beyond the scope of this note, Kopf also sanctioned Bowen's "passionate counsel" under FED. R. CIV. P. 11(b)(2) (albeit with a warning) because Bowen's claim was "plainly lacking in support under any reading of federal law." *Id.* at 1030-31.

86. TASLITZ, *supra* note 30, at 81-82.

87. Massey, *supra* note 3.

88. Mabin, *supra* note 4.

89. Massey, *supra* note 3 (quoting Anderson as saying "[the language ban is] a way of denying the woman's ability to describe her experience as she lived it").

heard all of the facts.[90] Clearly, these are very different conceptions of the same situation.

In fact, the rift between these two approaches to date rape may explain a good deal about the modern treatment of the crime. The defense often wants nothing more than for their client's acquittal, while the complainant often wants vindication not only for herself but for other women, too.[91] This may explain the fierce publicity generated around Bowen's case by victims' advocacy groups like Promoting Awareness, Victim Empowerment ("PAVE").[92] For them, Bowen represents an archetype: the Date Rape Victim Justice Ignores — an archetype that certainly has a foundation in fact. On the other hand, Safi and his counsel want to operate within the traditional framework of the criminal justice system, using its rules and precedents, to seek relief from criminal liability.[93]

Of course, some feminists argue that because the system is male in nature it cannot work for date rape victims.[94] Indeed, for radical feminists like Sheila Jeffreys, Andrea Dworkin, and Catharine MacKinnon, "social and cultural norms are intrinsically hetero-patriarchal, and women's consent in hetero-patriarchal society is always the less violent end of a continuum of sexual ownership, control, and use of women by men."[95] The frustration of both groups (the defendants who simply want to avoid jail time and the label of "sex offender" by playing by the rules, and the women who want their alleged attacker to be recognized as such, both for themselves and for their sex as a whole, whether or not according to the rules) is represented in Cheuvront's acerbic declaration of mistrial before the second trial even began:

> The inescapable conclusion from the petition promoting the rally [outside the courthouse on Bowen's behalf during juror selection] is that Ms. Bowen and her friends hoped to intimidate this court and interfere with the selection of a fair and impartial jury . . . . The gatherings and the speeches . . . were widely reported in the media. Unfortunately, this resulted in publicity that would make it virtually impossible to summon additional jurors who would be untainted by the media reports on these activities.[96]

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90. *See id.* (describing the word "rape" as a legal, conclusory term).

91. *See* Hammel, *supra* note 2 (quoting Bowen as saying "'I will do anything to make sure that this doesn't happen to another woman . . . .'").

92. Massey, *supra* note 3.

93. *See* Hammel, *supra* note 2 (describing Safi's attorney's strategy of using the Rules of Evidence to bar certain evidence).

94. Paul Reynolds, *The Quality of Consent: Sexual Consent, Culture, Communication, Knowledge and Ethics*, *in* MAKING SENSE OF SEXUAL CONSENT 93, 94 (Mark Cowling & Paul Reynolds eds., 2004).

95. *Id.*

96. *Judge Declares Mistrial*, *supra* note 17.

In other words, Cheuvront felt that Bowen and PAVE had undermined the criminal justice system, gone outside of its boundaries and prevented its usual operation. That Bowen felt obligated to do this speaks to the manner in which (alleged) date rape victims feel that the courts have failed them.[97] At the same time, many defendants feel exactly the same way.[98] Whereas the system was patently unfair to alleged victims until very recently, many men feel that feminist concerns have taken hold of the justice system, placing a presumption of guilt on alleged attackers.[99] As Stuart Taylor and KC Johnson write, "[s]imple morality, as well as the criminal-justice tradition, argues for an equilibrium in the difficult area of rape law that protects rape victims . . . without destroying the lives of innocent men."[100]

II. THE ISSUE OF CONSENT

According to some estimates, 12.1 million women have been raped at least once, and thirty-nine percent of those women have been raped more than once.[101] More than eighty percent of these victims were raped by someone they know.[102] One in four women in the United States will be victims of rape or attempted rape at some point in their lives.[103]

Rape, by its most basic definition, is sex without consent.[104] Notably, Susan Brownmiller wrote in 1975 that rape is "nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear."[105] According to Mary P. Koss and Sarah L. Cook, date rape is "a type of acquaintance rape that involves a victim and a perpetrator who have some level of romantic relationship."[106] Philosopher Mark Cowling extrapolates from this definition's mention of "some level of romantic relationship," "an

97. *See, e.g.*, Hammel, *supra* note 2 (noting Bowen's disillusionment with the legal process).

98. *See infra* Part III (explaining that some men feel that date rape laws are biased against them).

99. TAYLOR & JOHNSON, *supra* note 27, at 372.

100. *Id.*

101. Heather Schmidt, *Rape Statistics*, *in* ENCYCLOPEDIA OF RAPE 199, 199 (Merril D. Smith ed., 2004).

102. *Id.*

103. Stephanie L. Schmid, *Date Rape/Acquaintance Rape*, *in* ENCYCLOPEDIA OF RAPE, *supra* note 101, at 54.

104. COWLING, *supra* note 36, at 81.

105. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 6 (1975).

106. Sarah L. Cook & Mary P. Koss, *More Data Have Accumulated Supporting Date and Acquaintance Rape as Significant Problems for Women*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 97, 98 (Mary M. Cavanaugh, Richard J. Gelles & Donileen R. Loseke eds., 2d ed. 2005).

agreement to meet for a date, flirtatious conduct at a party, [or] a past relationship currently ended."[107]

Lois Pineau in turn defines date rape as "nonaggravated sexual assault," or "nonconsensual sex that does not involve physical injury or the explicit threat of physical injury."[108] Such a definition, while quite serviceable, displays the essential difficulty associated with dealing with date rape from a legal standpoint: Because there is no violence involved, the question must be asked how and why the accuser had unwanted sex when there was no threat made to coerce consent. Pineau's definition brings to the forefront the essentially abstract nature of date rape.

The central reason why the concept of date rape can be so difficult to understand is that consent, as an independent concept, is itself difficult to understand. In a discussion of aggravated rape, for instance when an assailant jumps out of the bushes and rapes a jogger, the victim clearly did not consent. In those situations, there is rarely a question of whether the victim is or is not a victim.[109] Often the violence used to obtain the sex is itself evidence of the lack of consent, and so the nature of consent need not be explored — a rape occurred and the victim is a victim.[110] For this reason, stranger rape is usually successfully prosecuted and the punishment is usually substantial.[111]

Any discussion of date rape, however, is far more complicated.[112] When consent requires discussion and conceptualization, the clear-cut simplicity associated with prosecuting aggravated stranger rape dissipates quickly. It is not so much consent's definition that stretches the mind — one might easily define it as "[v]oluntary agreement to or acquiescence in what another proposes or desires"[113] — rather, the difficulty with consent is in its communication, or lack thereof.[114]

Cowling notes that if we require lack of consent to be absolutely and unequivocally communicated no matter what, then laws will

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107. COWLING, *supra* note 36, at 33.

108. Lois Pineau, *Date Rape: A Feminist Analysis*, *in* DATE RAPE 1, 1-2 (Leslie Francis ed., 1996).

109. *See, e.g.*, ESTRICH, *supra* note 33, at 3.

110. *See, e.g.*, *id.* (describing Estrich's experience as a victim of violent rape); JOAN MCGREGOR, IS IT RAPE 1 (2005) (noting that "[r]ape is conceived of in legal practice and in the minds of many in society as a *violent* assault by a *stranger*.").

111. ESTRICH, *supra* note 33, at 3.

112. This is at least partially because of the conceptual problems we encounter when trying to criminally define date rape. As Dorothy Roberts writes, "'[i]f rape is violence as the law defines it (weapons, bruises, blood), then what most men do when they disregard women's sexual autonomy is not rape.'" ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 91 (2003) (citing Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 362 (1993)).

113. 3 OXFORD ENGLISH DICTIONARY 760 (2d ed. 1989).

114. COWLING, *supra* note 36, at 81.

require "'the utmost resistance'" in order to show consent was not given.[115] This was the requirement of most American laws until very recently.[116] On the other end of the spectrum, some would say that any sex with an inebriated person is nonconsensual and therefore rape.[117] Consent clearly must be informed for it to be meaningful.[118] Furthermore, consent clearly must be given "against a background of free choice."[119] Consent is also complicated by the fact that it can change over the course of a single interaction. Sometimes, sex can even be consensual though not wanted.[120] In sum, consent can be very confusing.

There is much subjectivity in consent, and where minds have not met, consent can mean very different things to two people engaged in a single act of intercourse.[121] This is often the result of a lack of clear, meaningful communication.[122] Cowling notes that in many cases of date rape, the man assumed the woman was consenting to more than she did.[123] Often such a lack of communication results from a lack of explicit discussion about the nature and scope of the consent given, but consent is not something most people are accustomed to discussing in the heat of the moment.

The cultural script of sex as we know it involves so much *unspoken* communication that to verbalize much of it would essentially ruin the experience. Joan McGregor notes that

> [p]art of the cultural message about sex is that men are aggressors or initiators of sex and women are not supposed to be eager about sex, so they need to be persuaded or "forced" into it. Adding to the problem are a significant number of women who say "no" but still desire sex and may later consent to sex.[124]

McGregor discusses a study by Muehlenhard and Hollabaugh in which thirty-nine percent of the interviewed college students said "no" at least once even when they intended to have sex.[125] Furthermore, McGregor observes,

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115. *Id.*
116. *Id.* (examining "older American state legislation").
117. *See id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *See id.* at 87 (observing that in many date rape cases, men perceived the women to be consenting to more than the women intended).
122. *Id.*
123. *Id.*
124. MCGREGOR, *supra* note 110, at 7.
125. *Id.* at 9-10.

> [w]omen after all often do not affirmatively verbally consent to sex, and often admit to using rejection strategies even when they desire sex. Is it then fair to men to hold them liable for rape when the situations themselves are so ambiguous, particularly when men believe (some would say justifiably) that the women's behaviors are consistent with consenting to sex? Is it not patronizing to women, some will ask, to permit them to say later that they did not consent, but at the time were unwilling to speak and let their views be known?[126]

Clearly, the communication of consent is often fraught with ambiguity, and contemporary normative conceptions of sex only contribute to the problem. As Cowling writes, "consenting behaviour, as it appears in the limited research available, involves issuing ambiguous invitations and responding warmly to (mainly physical) male advances.... [B]oth attempts to initiate sex and female acceptance are typically non-verbal."[127]

Although acceptance is very often expressed by a simple "yes," refusals, in contrast, are only rarely manifested by saying "no."[128] Instead, refusals are very often made and understood by other means.[129] As Gideon Calder writes, "[w]e do not speak literally, even when making ourselves clear."[130] It is for this reason that the defense of mistaken belief in consent is in many ways improper: If we can understand others in most communicative circumstances, it seems logical that we should also be able to during sex. Moreover, a common feminist complaint about investigating rape from the perspective of the male is that it "defines whether a rape occurred from the perspective of the accused rapist, not from the perspective of the victim or even based on a social standard of unacceptable force or of mutuality."[131]

Some countries do allow a mistaken belief in consent defense. Famously, in England, the House of Lords held in the 1975 case *Director of Public Prosecutions v. Morgan* that a man's mistaken but good faith belief in consent, even if unreasonable, would relieve him of criminal liability for rape.[132] American rape laws have not adopted such an approach. Many state courts have, in fact, adamantly noted

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126. *Id.* at 64-65.

127. COWLING, *supra* note 36, at 92.

128. Gideon Calder, *The Language of Refusal: Sexual Consent and the Limits of Post-Structuralism*, *in* MAKING SENSE OF SEXUAL CONSENT 57, 59-60 (Mark Cowling & Paul Reynolds eds., 2004).

129. *Id.*

130. *Id.*

131. CATHARINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS 131 (2005).

132. [1976] A.C. 182 (H.L.) (appeal taken from U.K.).

that there is no intent requirement at all for rape.[133] Susan Estrich does not see this as a moral victory for the United States, however.[134] As she notes, by leaving intent out of the prosecution, rape must be either a strict liability crime, or a crime that "effectively excludes [nonaggravated] simple rapes which present any risk that the man could have been unaware or mistaken as to nonconsent."[135]

Consent is so essential, in fact, and so intimately related to an alleged attacker's ability to claim consent as a defense that some have said it should be explicitly and verbally obtained before any sexual encounter.[136] "Communicative sexuality" is a model of sexual interaction in which verbal consent must be obtained for any sexual act.[137] Pineau advocated for communicative sexuality in a 1989 journal article.[138] In Pineau's view, the focus of a date rape trial should not be whether the man involved believed that the accuser consented; rather, it should be based on whether the complainant actually consented.[139]

Only once that fact has been ascertained should an inquiry into the alleged date rapist's reasonable belief in the accuser's consent take place.[140] Communicative sexuality is a framework of sex itself.[141] It requires that partners in sexual activities communicate with one another throughout their sexual experiences to ensure that the sex is at all times pleasurable and never coerced.[142] It follows that if

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133. Susan Estrich notes that at the time of publication in 1987, several courts had held that there was no intent requirement for the crime of rape. ESTRICH, *supra* note 33, at 94-95 (citing State v. Reed, 479 A.2d. 1291, 1296 (Me. 1984); Commonwealth v. Williams, 439 A.2d 765, 769 (Pa. Super. Ct. 1982); State v. Houghton, 272 N.W.2d 788, 791 (S.D. 1977); *see also* State v. Cantrell, 673 P.2d 1147, 1154 (Kan. 1983) *cert. denied*, 105 S. Ct. 84 (1984); Commonwealth v. Grant, 464 N.E.2d 33, 35-36 (Mass. 1984); People v. Hammack, 234 N.W.2d 415, 417-18 (Mich. Ct. App. 1975); Brown v. State, 207 N.W.2d 602, 609 (Wis. 1973) (as decisions not requiring intent). Estrich also cites to *Reynolds v. State*, 664 P.2d 621 (Alaska App. 1983), holding that "the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded victim's lack of consent," and *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975), "holding that the state must prove the defendant intentionally engaged in intercourse and was at least negligent regarding consent." *Id.* at n.11.

134. *See* ESTRICH, *supra* note 33, at 95 (describing the problems of this approach).

135. *Id.*

136. *See generally* Pineau, *supra* note 108 (discussing the concept of communicative sexuality as a possible remedy for what Pineau views as a male-centered legal philosophy of consent).

137. *Id.*

138. The article, *Date Rape: A Feminist Analysis*, first appeared in LAW &PHILOSOPHY. LESLIE FRANCIS, DATE RAPE xii (1996).

139. *Id.*

140. *Id.*

141. *See id.* at xiii (describing the inherent qualities of the communicative sexuality model).

142. *Id.*

communication does not occur, it is not reasonable for one to believe one's partner is consenting.[143] Thus, during a trial for date rape, the court would look for "evidence of an ongoing positive and encouraging response on the part of the plaintiff" instead of asking what the complainant did to express a *lack* of consent.[144]

Questioning the defendant about what the accuser did to indicate consent would be an efficient method of determining whether a crime occurred because if the alleged victim did not explicitly and verbally give consent, consent would not have been legally given.[145] Canada adopted this approach in its criminal code.[146] There, however, a *lack* of consent must be communicated.[147] Furthermore, it is not a defense that the accused believed the accuser consented, if the accused did not take "reasonable steps . . . to ascertain that the complainant was consenting."[148] Likewise, there is no consent where a complaining witness, who gave consent at first, changes her mind and expresses her lack of consent by words or conduct.[149] Antioch College adopted a "purer" form of communicative sexuality as a campus-wide policy, in which "persons who wish to engage in sexual activity must ask explicitly, and . . . negative answers must be given their normal meaning."[150]

The most obvious problem with Pineau's notion of communicative sexuality is that sex does not really work that way for many people. Some females enjoy sex that is not communicative, preferring instead to play the role of the passive or coy woman who wishes to be seduced by a strong man.[151] Others enjoy domination or partaking in sado-masochism.[152] If Pineau's framework is adopted, she essentially advocates telling such women that theirs is a "false consciousness."[153] From one point of view, then, communicative sexuality can seem paternalistic or condescending despite its good intentions.[154]

From a legal standpoint, consent is more than just communication, though communication is essential to it. When spoken aloud, as in the model of sexual activity proffered by communicative sexuality,

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143. *Id.*
144. Pineau, *supra* note 108, at 23.
145. *See id.* at 24 (presenting a hypothetical cross-examination of an accused date rapist).
146. Canada Criminal Code, R.S.C. § 273.1(2)(d) (1992).
147. *Id.*
148. *Id.* § 273.2(b).
149. *Id.* § 273.1(2)(e).
150. Pineau discusses the Antioch policy. *See* Pineau, *supra* note 108, at 65.
151. *See* FRANCIS, *supra* note 138, at xiv-xv.
152. *Id.*
153. *Id.* at xiv.
154. *See id.* (examining the views of liberal feminist theorists).

consent is a "performative utterance," in that the words are also an action — the act of consenting.[155] Non-verbal consent is performative in the same way. Consent is clearly an essential issue in all rape cases, but it is of particular importance for date rape. Date rape may not be a violent crime, but it is a violation of autonomy, of a woman's right to control her body, and of her power over her "territory."[156] This is something the law wants to protect. As McGregor writes,

> [c]onsent transforms existing moral and legal relationships often making what was impermissible, permissible. This conception of consent consequently must be normative since it changes existing rights and obligations. Consenting is not the same as merely willing or wanting or other kinds of mental states or attitudes because these have no power to change the normative universe, which is why I cannot "consent" to someone using another person's property. I can say the words, but they do not transform the moral and legal universe . . . . In the case of rape, as in a number of other areas, consent turns a criminal act into a non-criminal one.[157]

Legally, then, the presence of consent marks the essential difference between consensual sex and rape, and the prosecution's job in a date rape case is to establish the absence of this essential fact.[158]

It is difficult enough to prove that an accuser did not consent when she actually and meaningfully says "no," because often no one but the accused rapist heard the magic word; it is therefore extraordinarily harder to prove lack of consent when the complainant said nothing. Alcohol only makes this more true. In general, although an incapacitated person can "give" consent, that consent cannot be real since the person cannot form the requisite mental state to offer meaningful and informed consent.[159]

If the person is too drunk to "understand the nature and quality of what they would presumably be consenting to, then they are incapable of consent."[160] Of course, holding a drunk man responsible for having sex with a drunk woman seems in many ways uneven and unfair.[161] That both people are not held responsible for their actions seems to many people offensively paternalistic toward women and

155. COWLING, *supra* note 36, at 87.
156. MCGREGOR, *supra* note 110, at 106.
157. *Id.* at 115.
158. *See id.* (discussing the way consent changes legal relationships).
159. *Id.* at 140-41.
160. *Id.*
161. *Id.* at 152.

unfairly harsh to men.[162] Indeed, for Katie Roiphe, the very concept of date rape is offensively paternalistic and, moreover, it dilutes the reality of what she views as "real rape," meaning violent rape or rape committed under the threat of violence.[163] In sum, the manner in which we conceptualize consent can determine much of the ensuing trial. The issue of consent, and therefore communication, can set a rapist free or send an innocent man to prison. Consent is polarizing.

III. DEFENDANTS' RIGHTS

Those in favor of protecting men accused of date rape tend to desire a fair trial, an even playing field, and the preservation of the "innocent until proven guilty" standard.[164] These are fundamental principles of our criminal system's traditional treatment of defendants, but in the modern context of rape some feel these principles have been willfully ignored or forgotten.[165]

The most surprising aspect of the issue of rape defendants' rights is that some feminists explicitly adhere to a belief that these defendants should not possess the above-mentioned traditional rights.[166] This sometimes stems from these feminists' belief in the need for special rules in the arena of date rape.[167] Possibly, however, this belief sometimes arises from an over-compensatory desire to empower women, due to their historically poor treatment in date rape trials.[168]

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162. *See* KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS 53-54 (1993) (examining the inequality of date rape law, which holds drunk men accountable for their actions, but not drunk women).

163. *Id.* at 81-82.

164. *See supra* note 93 and accompanying text.

165. *See* TAYLOR & JOHNSON, *supra* note 27, at 373 (arguing that the focus needs to return to the defendant's rights, as opposed to focusing primarily on protecting the interests of the victim).

166. Wendy Murphy, attorney for Tory Bowen, said in reference to the Duke lacrosse rape case: "Stop with the presumption of innocence. It doesn't apply to Duke," as well as "I'm really tired of people suggesting that you're somehow un-American if you don't respect the presumption of innocence, because you know what that sounds like to a victim? Presumption you're a liar." *See* Durham-in-Wonderland, *supra* note 80, at Dec. 31, 2006, 12:01 EST.

167. [A]s feminist legal scholar Susan Estrich acknowledged in her influential writings on rape law in the 1980s, without corroboration a conviction is far less likely for any crime. But Estrich argued that, since "corroboration may be uniquely absent" in acquaintance rape cases, giving the same weight to corroboration for rape as for robbery or felony assault was unfair to rape victims.

Cathy Young, *Who Says Women Never Lie About Rape?*, SALON, Mar. 10, 1999, http://www.salon.com/news/1999/03/cov_10news.html.

168. "For so long," Jim Cooney reflected after his client Reade Seligmann and the other lacrosse players had been declared innocent, "rape victims were poorly treated by the legal system and, as a result, there was much to be ashamed of. In the 1970s and 1980s, the pendulum began to swing and we

Some critics of the contemporary treatment of accused rapists believe the justice system has adopted the feminist, politically correct *weltanschauung* in dereliction of the due process it owes all criminal defendants.[169]

One example of the asymmetrical legal treatment of men in rape trials involves the application of so-called rape shield rules of evidence.[170] The purpose of these rules, adopted in the 1970s by each state and the federal judiciary, is to prevent an accuser's sexual history from being exposed.[171] The rules thus protect the accuser from embarrassment, unnecessary exposure, and inferences of consent based on their perceived propensity for sexual interactions.[172] Some states, however, have enforced rape shield rules in a manner that tends to bar the admission of relevant evidence.[173] Furthermore, no such protection exists for accused rapists, and their sexual history is openly and often humiliatingly discussed and used as evidence in courtrooms.[174] For instance, in the much publicized sexual assault and battery case involving sportscaster Marv Albert,

> [t]he judge allowed the prosecution to use testimony by other ex-lovers of Albert about his alleged proclivity for rough sex. But when Albert's lawyers asked to call witnesses who would testify that the accuser had a history of making false assault and rape accusations against former lovers, the judge said no, citing a rape shield law to justify the blatant double standard. Albert was forced into a plea bargain.[175]

Although rape shield rules were instituted for an honorable purpose, their application clearly can contribute to the asymmetrical treatment of defendants.

> entered an era in which rape victims were always believed and the defendant was presumed guilty because it became wrong to question a victim of rape. We see this in spades now in child molestation cases in which the same issues have taken place. The pendulum somehow needs to be brought back to the center to the point where legitimate victims do not have their entire sexual histories revealed, but defendants are permitted to make legitimate and real inquiries into the truth of what is said."

TAYLOR & JOHNSON, *supra* note 27, at 373.

169. *Id.* at 371-72.

170. *Id.* at 380.

171. *Id.*

172. Lithwick, *supra* note 31.

173. TAYLOR & JOHNSON, *supra* note 27, at 380.

174. *See, e.g., id.* (discussing how the prosecution in Marv Albert's 1997 assault and battery case used his sexual history as evidence against him).

175. *Id.* at 380-81. Taylor and Johnson also cite the case of Oliver Jovanovic. In this example, key emails that contained important evidence that Jovanovic's accuser consented to the sexual activity in question were not admitted because they contained references to sexual acts performed with other men, supposedly in violation of New York's rape shield law. *Id.* at 380.

Defendants' rights proponents point to a general shift in the rhetoric used by today's media as a primary explanation for the contemporary asymmetrical treatment of accused and accuser.[176] In the 1970s, jurors were often warned to "treat the woman's testimony with special caution" per what is known as the Hale warning.[177] In the seventeenth century, Sir Matthew Hale wrote in an opinion that "rape . . . is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent," his statement serving as an undercutting influence on female accusers for centuries after its issuance.[178]

Cathy Young writes that because of the rise of feminism and the legal reforms instituted due to feminism's influence, the Hale warning is no longer the rule of the day.[179] Instead, she posits that the "believe the woman" principle has replaced it.[180] "Feminists often decry our culture's alleged eagerness to believe the 'myths of the lying woman.' But it seems that it's the 'victims don't lie' myth that is entrenched today."[181] This sort of feminist zealotry has been noticeably present in a number of statements Wendy Murphy made on various television shows as a commentator on the Duke lacrosse case as it unfolded.[182] Roiphe sees something akin to Young's entrenchment

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176. *See* Young, *supra* note 167 (discussing the shift in attitude accompanied by the use of "rape shield" laws).

177. *Id.*

178. Carol Pateman, *Women and Consent*, 8 POL. THEORY 149, 158 (1980).

179. *See* Young, *supra* note 167 (arguing that feminist rhetoric and the cliché "Women don't lie about rape" have replaced the Hale warning).

180. *Id.*

181. *Id.*

182. KC Johnson has a collection of false or otherwise misleading statements made by Murphy in the context of the Duke case on his blog. These (mis)statements range from stating false statistics and facts specific to the Duke case, for example, "betting" that the accuser had GHB in her blood, to "wholly unfounded speculation." Durham-in-Wonderland, *supra* note 80, at Dec. 31, 2006, 12:01 EST. For example, Murphy stated that the players were

> "thinking, 'I was entitled to do this. I'm a member of a wealthy white boy's school in a community that allow [*sic*] me to do what I want when I want.' . . . The e-mail shows that these guys were of the mind that whatever had happened to this woman was just another day at the beach. They'll rape her, sodomize her and tomorrow they'll kill her."

Id. This is not to call the veracity of Tory Bowen's claim into question, but to show that her lawyer is known for adhering to an overzealous philosophy of feminism as well as race and class consciousness. *Id.* Murphy's zealotry was also apparent when, as a visiting scholar at Harvard, she wrote a letter to the *Crimson* regarding the fact that unknown students had built a nine-foot penis out of snow in the middle of campus. Wendy J. Murphy, Letter to the Editor, *Supervision Absent*, HARV. CRIMSON, Mar. 3, 2003, *available at* http://www.thecrimson.com/article.aspx?ref=331253. Murphy wrote,

> What if students had built a snow sculpture of a Nazi swastika or the confederate flag? As a sculpture, a snow penis can't cause much direct harm,

of myth in that she feels many feminists have adopted a "rigid orthodoxy" that sacrifices rationality and the ability to be self-critical in favor of absolute "truths" that no one within the group may challenge.[183] This absolutism, Roiphe implies, can become institutionalized through the principles of political correctness, out of the contemporary obsession with accommodating all and offending none, even if it means cutting dialogue short.[184] Because of this institutionalization of the politically correct, as Young points out, the injustice once routinely faced by accusers in the courtroom has now shifted to the accused instead of being eradicated altogether.[185] As a result, "the feminist position . . . seems to leave no room for the presumption of innocence when a woman accuses a man of violating her."[186]

Young, albeit a self-described "libertarian conservative," is concerned with women's resulting ability to use rape charges as a weapon by fabricating the crime.[187] Similarly, Roiphe writes that although it is possible that fabricated rape charges are isolated incidents, some feminists seem quite willing to regard the truthfulness of individual rape accusations as one factor to be "weighed in the larger political balance: 'Did this member of a group sexually trained to woman-hating aggression commit this particular act of woman-hating aggression?'"[188] This sort of calculus, says Roiphe, foregoes rational inquiry, and thereby certainty, in the name of "politicized group psychology."[189] This critique, if true, is disconcerting. Even MacKinnon, a noted radical feminist legal philosopher, writes that

> [i]t is not in women's interest to have men convicted of rape who did not do it, any more than it is in women's interest not to

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> but it clearly serves as a powerful symbol of sexual dominance and gendered violence. Would Harvard's administration have been so deafeningly silent if students built a sculpture that symbolized race dominance or ethnic cleansing?

Id. In response, Cathy Young asked, "Does this mean that sexual intercourse is comparable to the Holocaust, slavery, and ethnic cleansing?" Cathy Young, *Harvard's Peter Principle: On the Inphallibility of the Ivy Leagues*, REASON MAG., Mar. 11, 2003, http://www.reason.com/news/show/31895.html.

183. ROIPHE, *supra* note 162, at 5. It is important to note that Roiphe is by no means "antifeminist." She writes that "[i]t is out of the deep belief that some feminisms are better than others that I have written this book." *Id.* at 7.

184. *Id.* at 5.

185. Young, *supra* note 167.

186. *Id.*; *see also* ROIPHE, *supra* note 162, at 41 (stating that in a rape case, "no one is considered innocent until proven guilty").

187. Young, *supra* note 167; *see also* Cathy Young, *The Rape Charge as Weapon*, BOSTON GLOBE, May 1, 2006, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/05/01/the_rape_charge_as_weapon [hereinafter Young, *Rape as Weapon*].

188. ROIPHE, *supra* note 162, at 41.

189. *Id.*

> have men convicted of rape who did. Lives are destroyed both by wrongful convictions and the lack of rightful ones, as the law and the credibility of women — that rare commodity — are also undermined.[190]

Both sides of the argument can agree that only the guilty should be convicted and that women have not historically been treated fairly in rape trials. The agreement ends there, however, as defendants' rights advocates and feminists disagree on which way the scale should tip if it cannot be balanced. The essential question is whether the system should be more inclined to protect innocent defendants, sometimes at the expense of women who have been date raped, or whether the system should be designed to ensure that more women's complaints result in convictions at the expense of some innocent men. Importantly, most defendants' rights advocates wish only to yield to the existing fairness mechanisms inherent in our legal system.[191] Conversely, radical feminists believe that the "system" is male in nature and therefore, by default, favors the male accused.[192] Behind defendants' rights advocates' desire for "simple fairness" lies an analogous and deep distrust of the influence of feminism on the legal system's treatment of rape defendants:

> [T]he changes [to the legal system's treatment of rape] have gone too far, driven by radical feminists' wild exaggerations of the extent of male sexual predation and female victimization and their empirically untenable view that women never (or hardly ever) lie about rape. In effect, radical feminists' push has been for a regime that guarantees no rapist go unpunished, but any such regime would inevitably convict a great many innocent men. Simple morality, as well as the criminal-justice tradition, argues for an equilibrium in the difficult area of rape law that protects rape victims from undue humiliation without destroying the lives of innocent men.[193]

Beyond issues of legal philosophy, it would be difficult to deny that the current climate rushes to blame those accused of rape.[194] As a result, innocent men, whether convicted or not, often have their credibility

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190. MACKINNON, *supra* note 131, at 131.

191. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) ("[P]resumption of innocence in favor of the accused is the undoubted law . . . ."), *quoted in* Mr. Bryant's Motion to Preclude References to the Accuser as the "Victim" at 3, People v. Bryant, No. 03 CR 204 (Colo. Dist. Ct. May 3, 2004) [hereinafter Motion to Preclude "Victim"].

192. MACKINNON, *supra* note 131, at 131.

193. TAYLOR & JOHNSON, *supra* note 27, at 372.

194. *See id.* (surmising that the change from doubting women accusers to the current state, in which men accused of rape are presumed guilty, goes too far).

destroyed.[195] This is not to say that anywhere near the majority of rape accusations are false; rather, the legal system lacks strong safeguards to screen and prevent false accusations that often have dire consequences.[196] As Taylor and Johnson write, "[t]errible as it is for a victim to see a rapist escape punishment, it is far, far worse for an innocent person to be convicted of a sex crime."[197]

Taylor and Johnson, in their case study of what John Grisham calls "the pathetic rush to judgment"[198] in the Duke lacrosse rape case, thoroughly explore this lack of safeguards.[199] For Taylor and Johnson, the influence of feminism and political correctness has reversed the presumption of innocence standard so that rape defendants are now guilty until proven innocent.[200] Particularly when the alleged crime receives great attention from the media and victim advocacy groups, "[p]rosecutors and police come under especially intense public pressure to quickly" arrest and prosecute the supposed rapist.[201] This sometimes leads to the hasty arrest of innocent men who, long before their day in court, are treated in the media as guilty and, moreover, monstrous.[202]

Taylor and Johnson find that the pressure on prosecutors to convict no matter what also increases the likelihood of prosecutorial misconduct:[203]

> Many overzealous prosecutors begin by being too reluctant to question shabby or dishonest investigative work by police. Many rush to judgment based on sketchy evidence; facing huge caseloads, such prosecutors become complacent or lazy after seeing twenty clearly guilty defendants in a row and wrongly presume the guilt of the twenty-first. Many explain away late-arriving evidence of innocence that would make any open minded prosecutor doubt his initial theory. Some allow close (or not-so-close) judgment calls to be skewed by political ambition and play to the crowd, or to the media mob, in high-visibility cases.[204]

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195. *See id.* (contrasting the need to protect the victim with the need to avoid "destroying the lives of innocent men" unjustly accused of rape).

196. *Id.*

197. *Id.*

198. TAYLOR & JOHNSON, *supra* note 27, at cover jacket.

199. *See generally id.* (exploring the story of three Duke University lacrosse players falsely accused of rape and discussing the prosecutorial misconduct and later disbarment of district attorney Mike Nifong, who led the smear campaign against the lacrosse players).

200. *Id.* at 371-86.

201. *Id.* at 360.

202. *Id.*

203. *Id.* at 358-59.

204. *Id.* at 358.

Taylor and Johnson also point to the common practice of de facto police perjury as a contributing factor in the asymmetrical treatment of rape charge defendants.[205] Although the practice may have its origin in officers' desire to get evidence admitted at trial that search and seizure rules would otherwise bar, Taylor and Johnson allege that as it becomes habit, police perjury can contribute to the conviction of innocent men.[206] Taylor and Johnson's exploration of the harrowing experience of the falsely accused rapist illuminates the very reason why the rape charge can be used so effectively as a weapon.[207] Only after accepting that rape charge defendants are treated differently, with greater prejudice and fewer safeguards, can one also deem acceptable language bans in the courtroom like the one in *State v. Safi*.

The fact that similar language orders are relatively common is a testament to the legal system's growing awareness of this issue. Hal Haddon, the defense attorney who successfully represented Kobe Bryant in his much-publicized rape case, writes that defense attorneys

> pretty routinely get orders precluding use of the term [victim] in cases where consent is the defense. From a common sense standpoint, if all parties are to be treated equally before the jury and in the press, they should be referred to by their names and not by some supposed legal status.[208]

It is important to note, as Haddon does, that these types of orders are common only in date rape cases in which the defense is consent.[209] This bespeaks the fact, discussed above, that date rape is fundamentally different from violent rape. Where the victim is undoubtedly a victim because she is bruised and bloody, there can be no doubt about her status. Where, on the other hand, the allegation is date rape, which, as discussed above, comes down to the nearly unknowable issue of consent, to refer to the accuser as "victim" is, at a minimum, to accept that a crime was committed.[210] Indeed, one of the main

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205. *Id.* at 361.

206. *See id.*

207. *See id.* at 372-73 (discussing the plight of the Duke lacrosse players who were falsely accused); *see generally* Young, *Rape as Weapon*, *supra* note 187 (discussing the danger of our society's over-compensatory swing of the pendulum of justice such that defendants of rape accusations are presumed to be guilty, whereas "[a] couple of generations ago, a stripper at a party with athletes would have been viewed by many as fair game.").

208. Email from Hal Haddon to Jason Wool (Nov. 5, 2007, 03:26:10 PM EST) (on file with author).

209. *Id.*

210. Order Re Mr. Bryant's Motion to Preclude References to the Accuser as the "Victim" at 2, People v. Bryant, No. 03 CR 204 (Colo. Dist. Ct. May 28, 2004) [hereinafter Bryant Order].

questions in a date rape trial is whether a crime took place at all.[211] For the court to allow witnesses and the prosecution to give the impression that a crime did in fact take place is ostensibly to answer a question of fact that only a jury can properly answer.[212] But referring to the accuser as victim can be problematic for a number of other reasons. As Haddon notes in his motion, "it is improper for the prosecutor or the court to express a personal belief in the credibility of prosecution witnesses or a personal belief in a criminal defendant's guilt."[213] More importantly, allowing the accuser to be referred to as the victim in a date rape case in which the defense is consent "violat[es] the presumption of innocence."[214] This is so at least in part because referring to the accuser as "victim" "would wrongly suggest to the jury that the Court holds a favorable view of the accuser's credibility," which "dilutes the presumption of innocence."[215] Orders banning use of the word "victim" therefore serve to keep trials procedurally proper and fair for defendants, as well as avoid the appearance of impropriety for prosecutors.

In the *Bryant* case, the court found that there is no "legal right to be referred to as a 'victim' during trial" and that "[t]he common understanding of the term 'victim' certainly implies that a person has been the subject of a particular wrong or crime."[216] Importantly, this case raised a question of first impression for the Colorado district court.[217] All of the cases cited by Chief District Court Judge W. Terry Ruckriegle to support his order were from other states, a fact that bespeaks the relative recentness of language bans used to protect defendants from presumptions of guilt. The cases cited came from only three states, and the oldest one is from 1985.[218] Clearly, language bans like the one granted in *Bryant* are a recently developed

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211. Motion to Preclude "Victim," *supra* note 191, at 4.

212. *See id.* (citing Allen v. State, 644 A.2d 982, 983 n.1 (Del. 1994); Jackson v. State, 600 A.2d 21, 24 (Del. 1991); State v. Wright, No. 02CA008179, 2003 WL 21509033, at *2 (Ohio App. July 2, 2003) (holding that the State must prove its case that there was in fact a victim)).

213. *Id.* at 5 (citing Wilson v. People, 743 P.2d 415, 418 (Colo. 1987); People v. Wright, 511 P.2d 460, 463 (Colo. 1973); People v. Rogers, 800 P.2d 1327, 1328 (Colo. App. 1990); People v. Martinez, 652 P.2d 174, 178 (Colo. App. 1981)).

214. *Id.* at 4.

215. *Id.* at 11 (citing United States v. Safley, 408 F.2d 603, 605 (4th Cir. 1969); United States v. Johnson, 371 F.2d 800, 804-05 (3d Cir. 1967); United States v. Meisch, 370 F.2d 768, 773-74 (3d Cir. 1966)).

216. *See* Bryant Order, *supra* note 210, at 2.

217. *Id.*

218. *Id.* The cases are from Delaware, Ohio, and Texas: Mason v. State, 692 A.2d 413 (Del. 1996); Allen v. State, 644 A.2d 982 (Del. 1994); Jackson v. State, 600 A.2d 21 (Del. 1991); State v. Wright, 02CA008179, 2003 WL 21509033 (Ohio App. July 2, 2003); Veteto v. State, 8 S.W.3d 805 (Tex. Ct. App. 2000); Talkington v. State, 682 S.W.2d 674 (Tex. Ct. App. 1985).

tool for defense attorneys to maintain the presumption of innocence, which may explain why many people might be shocked that such orders are granted "pretty routinely."[219] In addition, it should be noted that in granting Haddon's motion, Judge Ruckriegle ordered that the court would continue to use the term "alleged victim" and that the prosecution *and* prosecution witnesses were precluded from using the term "victim."[220]

Given the reasoning behind banning the word "victim" from the courtroom, the question arises why it should not be equally apropos to ban other legally conclusive language such as "rape." Yet the language ban in *State v. Safi* has drawn the ire of many, some of whom even admit that language bans like the one in *Bryant* are reasonable. Professor Robert Weisberg, a criminal law professor at Stanford Law School, for instance,

> has no problem . . . with the fact that courts have gradually jettisoned the word *victim* for the less loaded *complainant*. The former proves too much. But he cautions that there is no value-neutral word for unwanted sex and that the word *intercourse* "understates what happens in a rape case."[221]

Given the fact that bans on "victim" are used specifically in date rape cases in which consent is the defense, however, using a word such as "intercourse" under similar circumstances could at least come close to describing what happened, despite Weisberg's admonition.[222]

That date rape is different has not escaped the attention of some critics of the language order in *State v. Safi*. Dahlia Lithwick, for instance, writes

> [t]he fact that judges are not rushing to ban similarly conclusory legal language from trial testimony — presumably one can still say *murder* or *embezzlement* on the stand — reflects not just the fraught nature of language but also the fraught nature of rape prosecutions. We as a society still somehow think rape is different — either because we assume the victims are especially fragile or because we assume they are particularly deceitful. Is the word *rape* truly *more* inflammatory to a jury than the word *robbery*? Yes, the question of the victim's consent surely makes a rape trial more complicated than some other kinds of criminal trials. But the fact that the evidence may be more equivocal hardly makes the underlying word more likely to incite blind juror outrage.[223]

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219. Email from Hal Haddon to Jason Wool, *supra* note 208.

220. Bryant Order, *supra* note 210, at 3.

221. Lithwick, *supra* note 6.

222. As Clarence Mock says, "'You can have forced intercourse, or you can have legal intercourse.'" Mabin, *supra* note 23.

223. Lithwick, *supra* note 6.

Lithwick does not appear to grasp the full meaning of her statement "rape is different."[224] As Haddon asserts, date rape trials are different because the main question in these proceedings is whether a crime was committed.[225] This fact alone should be answer enough for Lithwick's pondering over why judges do not make similar motions in murder, embezzlement, or robbery trials. In those cases, no doubt exists that a crime occurred, and so language bans would not be useful. Indeed, it seems reasonable that the special nature of date rape trials should warrant special procedures.

Bowen and her legal defense team find, however, that the special procedure used in *State v. Safi* was not reasonable, and, further, that it violated Bowen's constitutional rights.[226] In a brief to the court requesting reconsideration of the language order Bowen's lawyers laid out their argument against the language order. The brief asserted that the language order "encroache[d] unlawfully on the victim's constitutional rights."[227] The gravamen of this argument is that courts are agents of the state and are thereby precluded from placing restraints on the speech of witnesses that substantively alters their ability to describe their experiences.[228] This argument proceeds under the First and Fourteenth Amendments. According to Bowen, the language order impaired her "First Amendment right to testify truthfully before a judicial proceeding."[229] In Bowen's mind, if she cannot give an account of her experiences using her own words, she is ostensibly being forced to lie on the stand.[230] Therefore, "the court's language order is unconstitutionally coercive, essentially requiring the victim to commit perjury."[231]

Bowen also argued that the language order violated sound public policy.[232] This argument stems from Bowen's feeling that the order, by forcing her to use terms like "sex" and "intercourse," "effectively forces the jury to hear characterizations of the charged conduct only as nonharmful if not pleasurable behavior."[233] This argument relies

224. *Id.* Oddly, she does seem to understand the complexity of this statement in other articles. *See, e.g.*, Lithwick, *supra* note 31, at WK11.

225. Email from Hal Haddon to Jason Wool, *supra* note 208.

226. Motion for Reconsideration, *supra* note 81; *see also* Bowen v. Cheuvront, 516 F. Supp. 2d 1021 (D. Neb. 2007) (discussed in detail in Part I).

227. Motion for Reconsideration, *supra* note 81, at 1.

228. *Id.* at 1-2 (citing Shelley v. Kraemer, 334 U.S. 1, 14 (1948)).

229. *Id.* at 3 (citing Samora v. Poulin, 2007 WL 1385621 (D.N.H. May 9, 2007); Cossette v. Poulin, 2006 WL 3751206 (D.N.H. Dec. 18, 2006); Benedict v. Town of Newburgh, 95 F. Supp. 2d 136 (S.D.N.Y. 2000)).

230. *Id.* at 4-5.

231. *Id.* at 5.

232. *Id.* at 5-8.

233. *Id.* at 5.

on "cultural" definitions of "sex" and "intercourse."[234] In her brief, Bowen provided the following definition of "sexual intercourse": "'penetration of the vagina by the penis.'"[235] She also noted that this dictionary entry refers the reader to the dictionary entry for the term "coitus," defined as "'physical union of male and female genitalia accompanied by rhythmic movements.'"[236] Bowen's brief then states, "[n]one of these terms describe criminal or even harmful behavior."[237] This statement once again fails to grasp the essential character of date rape trials — the central question is precisely whether a criminal or a consensual act has taken place.[238]

Although minds will differ over whether a "value neutral" term for sexual intercourse exists, the definitions cited by Bowen in her brief are hardly more than scientific or essentialist descriptions of the physical act of sex. Neither definition mentions consent, nor do the definitions mention the surrounding context in which sex occurs.[239] Both definitions merely describe the physical actions that take place when sex, whether consensual or nonconsensual, occurs. Whether it is rape or not, the penis must penetrate the vagina. Bowen's brief, however, somehow comes to the conclusion — unexplained — that "rape is never sex and sex is never rape."[240]

If one accepts that date rape trials are different for the above-mentioned reasons, then it makes sense that terms that could be used either in a consensual or nonconsensual context should be used to describe the physical act that is the subject of the trial. Although disallowing a woman who feels she has been raped from saying just that may violate her First Amendment rights, little support exists for this assertion. Bowen's brief cites only one case, from another jurisdiction, to support the notion that "a judge cannot . . . control [the words used by] lay witnesses."[241] Bowen asserted that the language order could be constitutional if it applied only to prosecutors, following other jurisdictions that have granted motions banning the word "victim," but not in response to witness testimony.[242] The discussion of the *Bryant* language order in this note, however, shows that Bowen's

234. *Id.*

235. *Id.* at 6 (quoting Merriam-Webster's Online Dictionary, http://www.m-w.com/dictionary/sexual_intercourse (last visited Oct. 24, 2008)).

236. *Id.* (quoting Merriam-Webster's Online Dictionary, http://www.m-w.com/dictionary/coitus (last visited Oct. 24, 2008)).

237. *Id.*

238. Motion to Preclude "Victim," *supra* note 191, at 4.

239. Motion for Reconsideration, *supra* note 81, at 6.

240. *Id.* at 5.

241. *Id.* at 8 (citing Jackson v. State, 600 A.2d 21 (Del. 1991)).

242. *Id.* at 7 (citing State v. Wright, No. 02CA008179, 2003 WL 21509033, at *2 (Ohio App. July 2, 2003); Talkington v. State, 682 S.W.2d 674 (Tex. Ct. App. 1985)).

assertion is incorrect. In *Bryant*, the order applied to witnesses as well as to the prosecution.[243] Needless to say, Bowen's motion was not granted, which led her to seek federal intervention.[244]

IV. SOME POINTS ON FEMINIST CRITIQUES OF DATE RAPE TRIALS

Up to this point, the defendants' rights perspective has relied on a major assumption, namely that date rape is different from "real rape" in that the trial's primary purpose is to establish whether a crime occurred, whereas in other rape trials it is established that a crime has occurred and the question is whether the defendant is the perpetrator. Thus, the defendants' rights position embraces a perspective of date rape trials in which a determination of the existence of consent is essential. Furthermore, to make this determination there often must be evidence that the woman did not consent.

For many feminists, however, such a perspective is part and parcel to the "rape culture" in which (they believe) we live. In this "rape culture," "[t]he baseline assumption has been that women are consenting to sex until there is significant evidence to the contrary. The default is consent."[245] Although this view accepts the important role consent plays in date rape,[246] it does not accept the manner in which we determine the existence of consent, particularly because historically a woman had to give the utmost resistance to a man's sexual advances to manifest a lack of consent.[247] For exactly this reason, feminists have proposed communicative sexuality as a legal model for the determination of consent.[248] Moreover, many feminists question if rape victims can ever receive justice in a legal system that is fundamentally male in nature:

> Ethics codes set broad limits on fair tactics [in the courtroom], but within those limits trial lawyers are taught to be "[l]ike Rambo . . . tough, aggressive, and intimidating." Metaphors of litigation as combat or sport dominate lawyers' professional magazines and conversations. Lawyers speak of "playing hardball," "taking no

243. Bryant Order, *supra* note 210, at 3.

244. Bowen v. Cheuvront, 516 F. Supp. 2d 1021, 1023 (D. Neb. 2007).

245. MCGREGOR, *supra* note 110, at 104.

246. *See id.* at 106 ("Consent . . . figures centrally in unaggravated rape, providing the key to understanding the moral wrongfulness and seriousness of this form of sexual assault. Consent is important because we value autonomy, and consent provides individuals with a certain kind of power over their 'territory.'").

247. *See* COWLING, *supra* note 36, at 81 (mentioning that older state rape laws required a woman to exercise "utmost resistance").

248. *See supra* notes 136-44 and accompanying text.

> prisoners," "destroying," and even "raping" witnesses. They brag about "points scored" and "duels" won, and urge their colleagues to have an "instinct for the jugular."[249]

This sort of maleness, some critics say, is directly woven into the fabric of the adversarial system.[250] More than that, some critics of date rape trials specifically assert that the legal treatment of date rape complainants forces them to submit to the normative values of a chauvinist society.[251]

Take, for instance, Andrew E. Taslitz's discussion of the date rape trial of William Kennedy, nephew of Senator Edward Kennedy of Massachusetts, in which the complaining witness was Patricia Bowman.[252] Taslitz describes how defense counsel, on cross-examination, asked Bowman why she had taken so long to remove her underwear after the alleged date rape:

> Defense counsel, by his power to raise and enforce topics, led Bowman to accept counsel's critical assumption: that how long Bowman kept her panties on was relevant to whether she consented. It is significant that counsel never said why feeling "dirty" should have required Bowman to remove only one particular article of clothing, her panties. But defense counsel did not need to do so. He implied that if Bowman were telling the truth, then the reason she felt symbolically dirty was because of the "polluting powers of male seminal fluids." Therefore, if Bowman were indeed raped, she would have quickly removed the source of her moral pollution, her panties. . . . If she felt dirty but did not remove her panties, counsel suggested, then the locus of the dirtiness could not have been the physical acts of penetration and ejaculation. The locus of filth lay elsewhere: in Bowman's guilt about having impersonal, consensual sex with a man she had just met.[253]

Taslitz also describes how Kennedy's counsel made much out of the fact that Bowman had, at one point, removed her pantyhose, because, Kennedy's counsel implied, "the absence of pantyhose, an item of clothing 'guarding' the female genitalia, bespoke a woman of deep sexual craving."[254] By eliciting this sort of testimony, asking indirect questions that imply negative characteristics, and asking and withdrawing improper questions, defense counsel has the power to use

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249. TASLITZ, *supra* note 30, at 81.

250. *Id.* at 81-82.

251. MACKINNON, *supra* note 131, at 131-34; TASLITZ, *supra* note 30, at 81-99; Calder, *supra* note 128, at 61-63.

252. TASLITZ, *supra* note 30, at 82-84.

253. *Id.* at 83.

254. *Id.* at 84.

the legal system, as well as the mores of the jurors, against a woman who has legitimately been date raped.[255] Furthermore, the tactical use of objections and interruptions, particularly when the prosecution asks a question of the complainant that "calls for a narrative," can have the effect of making the testimony of complaining witnesses less believable and, more importantly, harrowing for the speaker.[256] This can have the effect of silencing the current complainant, as well as deterring others from wanting to take the stand in date rape trials.[257] The conclusion that some feminist critics reach, then, is that if the legal rules enable this sort of treatment of date rape complainants, then the rules are themselves male in nature.[258]

This institutionalization of maleness into the legal system is, in turn, part of a larger cultural problem in which rape is itself a form of male domination of women. As MacKinnon explains:

> Sexual violation symbolizes and actualizes women's subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men. Availability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth. To be a means to the end of the sexual pleasure of one more powerful is, empirically, a degraded status and the female position.[259]

Feminist critics therefore suggest that in a patriarchal system, if women can only consent or not consent, then they are fundamentally viewed from a cultural point of view as "rapeable."[260] If this is the case, then "consensuality [sic] does indeed seem to be analytically irrelevant."[261] One who accepts this conclusion clearly cannot also agree with the central assumption of the defendants' rights position, namely that date rape adjudication is different because it seeks to determine whether there was consent (no crime) or not (crime). If one cannot accept the notion of consent, one also cannot accept the position that date rape is different.

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255. *Id.* at 81-91, 97.

256. *Id.* at 98.

257. TASLITZ, *supra* note 30, at 137.

258. MACKINNON, *supra* note 131, at 131-34; *id.* at 81-99; Calder, *supra* note 128, at 61-63.

259. MACKINNON, *supra* note 131, at 129; *see also* Calder, *supra* note 128, at 61-62 (stating that "[r]ape, then, is one of culture's many ways of 'feminising' women. It follows a sort of pre-existing script which defines some of us (men) as legitimate *subjects* of violence, and others (women) as its rightful *objects*. Hence women are cast into the role of victims in a script not of their own authorship").

260. *See* Calder, *supra* note 128, at 62 (discussing the "rape script" and reform).

261. *Id.* at 63.

Although there is no reason to believe that Tory Bowen adheres to a radical feminist ideology, it seems clear from her opposition to the language order in her case that she feels she is being forced to accept a male rule in a male system.[262] In her mind, she did not consent, therefore, she should have the opportunity to say so in whatever way she desires.[263] The contrast between the female desire to "have my day in court" with the defendants' rights advocates' desire to "play by the rules" elucidates at least one possible conclusion about today's legal system: It cannot work for both men and women in the context of date rape trials.[264]

CONCLUSION

For the purposes of this note, it may be stipulated as fact that date rape trials have historically not been friendly to complainants.[265] At the same time, the defendants' rights position holds that various reforms instituted in recent decades under the guise of making date rape trials fairer for the complaining witness have in fact gone too far, at the expense of a fair trial for the defendant as well as the "innocent until proven guilty" principle.[266]

Although this note accepts that the need for reforms regarding the legal treatment of complainants was great due to the historically poor treatment of women who allege date rape, it nonetheless takes the position that certain special procedures must be available to

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262. *See* Mabin, *supra* note 23.

263. *Id.*

264. Somewhat ironically, in light of her other article discussed in this note, Lithwick wrote particularly incisively on this issue in a 2004 *New York Times* piece in which she recognized that fairness to defendants and fairness to complainants are, to some extent, mutually exclusive concepts. Lithwick, *supra* note 31, at WK11. She wrote:

> This well-intentioned reform in our rape laws [i.e. institution of rape shield laws] has led to two unappealing alternatives: Either the defendant's legal presumption of innocence is flipped on its head, since rape shield laws unambiguously deny him access to potentially exculpatory evidence. Or — as a practical matter — the woman's sexual history goes on trial regardless, permitting humiliating public scrutiny often likened to a second rape.

Id. Lithwick is not a radical feminist, of course, and it is doubtful that she would take her position to the extreme. In her statements, she appears to blame the media for exacerbating a situation that could potentially be handled by the courts in a vacuum. "In the Bryant case, by insisting on its constitutional right to act as watchdog, the press gained access to the most lurid details of the accuser's intimate life. Consequently, high-profile rape trials allow the media to do far more damage than rape shield laws ever tried to mitigate." *Id.* As shown by the events of *Bryant*, "by detailing the sexual conduct of Mr. Bryant's accuser in the seventy-two-hour period surrounding her [alleged] rape, the press will eviscerate the entire purpose of the Colorado rape shield law[.]" *Id.*

265. *See supra* notes 177-78 and accompanying text.

266. *See supra* notes 169-74 and accompanying text.

defendants of date rape allegations in order to ensure that they may experience a fair trial.[267] Because language orders barring "victim" have come to be accepted in date rape trials in which consent is the defense (largely due to the recognition, either conscious or subconscious, that date rape trials are different than other rape trials), the same logic should apply to language orders barring "rape" in similar circumstances, namely date rape trials in which consent is the defense.[268]

As an addendum, however, although this note takes the position that terms like "intercourse" are value neutral, there may be validity in Bowen's claim that having to pick her words carefully caused her testimony to seem less credible to the jury.[269] Therefore, if "rape" language orders are to be issued in the future, it seems only fair for the judge to instruct the jury that the order is in place, and that the complainant will not be able to use legally conclusive terms. Furthermore, reforms may be necessary to ensure that evidentiary rules and the broader legal treatment of date rape defendants do not deny defendants equal protection of the law, although this topic is beyond the scope of this note.[270] Although radical feminist critiques of date rape adjudication may be valid in theory, in practice it is impractical to propose a mass overhaul of our entire legal system in favor of a non-patriarchal one.[271] This note can be meaningful only under a less radical lens. Historical unfairness to one group cannot be corrected by imposing similar unfairness on another.[272] If one can accept that the legal system we have is the one within which we must work, however, then it is far from impossible to imagine that a date rape defendant's right to a fair trial, with its corresponding presumption of innocence,

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267. *See supra* Part III.

268. *See supra* Part III.

269. *See, e.g.*, Mabin, *supra* note 23 (discussing the effect of language orders on a jury's perception of Bowen's credibility).

270. Interestingly, constitutional challenges to rape shield laws on equal protection and due process grounds have been roundly rejected. *See* Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645, 706 (2001) (stating that "[t]he rape shield laws have been challenged on equal protection grounds, and despite the fact that they appear to set up a classification between prosecutors and criminal defendants, courts uniformly have analyzed the classification as one between sexual offense defendants and other criminal defendants. Finding that sexual offense defendants are not a suspect class and that the rules do not impinge upon a fundamental right, the courts have applied a rational basis standard of scrutiny and have implicitly upheld the classification embodied in Rules 412 through 415" (citations omitted)); *see also* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 722 (1995); Shawn J. Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 497-98 (1997).

271. *See supra* Part IV.

272. *See, e.g., supra* notes 164-69 and accompanying text.

can be maintained without sacrificing the dignity of and fairness to date rape complainants. Language orders, when correctly issued and in the proper circumstances, are a step in that direction.

Finally, it is worth noting that, as some of the jurors remarked, Pamir Safi probably was guilty.[273] The police report offers objective, factual data in support of this proposition, such as reference to video footage of Safi and Bowen leaving the bar together in which Bowen "appeared to have great difficulty walking and was being assisted by" Safi, and the fact that when Bowen underwent examination by a Sexual Assault Nurse Examiner approximately twelve hours after Brothers closed, her blood alcohol content was "still over .10."[274] Evidence also showed a pattern of behavior of Safi having sex with women too drunk to consent.[275] Facts like these, when properly presented in court under the applicable rules of evidence, are enough to convict. Belief in Safi's guilt does not change the fact that the presumption of innocence is fundamental to our criminal justice system. The presumption of guilt frequently associated with date rape can only move society closer to authoritarianism. Tools such as language orders are a means of preventing this outcome.

JASON WOOL*

273. Mabin, *supra* note 4.

274. Affidavit of Probable Cause, *supra* note 1, at 2.

275. Mabin, *supra* note 4.

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